88-522 (1)

Supreme Court, U.S.
FILED
SEP 27 1988
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. PENSION FUND and VITO J. PITTA AND ALBERT A. FORMICOLA, as Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund,

Petitioners,

v.

PARK SOUTH HOTEL CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 27, 1988

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QUESTIONS PRESENTED

1. Whether a sale of 100% of the partnership interests in a business constitutes a "complete withdrawal" by an employer pursuant to 29 U.S.C. § 1383, where the same transaction, structured as a direct sale of assets, would incur withdrawal liability to the employees' pension plan pursuant to the Multiemployer Pension Plan Amendments Act?

2. Did Congress intend to exempt sales of partnership interests from withdrawal liability, where such sales were not specifically excluded among other specific exclusions in the statute and where the loss of the original partners as responsible parties places at risk the contribution bases of multiemployer plans and subjects retirees to the risk of financially weaker successors?

PARTIES TO THE PROCEEDING

Petitioners are New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund and its trustees Vito J. Pitta and Albert A. Formicola.

Respondent is Park South Hotel Corp.

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NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. PENSION FUND and VITO J. PITTA AND ALBERT A. FORMICOLA, as Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund,

Petitioners,

v.

PARK SOUTH HOTEL CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on June 29, 1988, which reversed the decision and judgment of the United States District Court for the Southern District of New York granting petitioners a declaratory judgment decreeing that respondent and the partnership of which it was general partner are jointly and severally liable for withdrawal liability pursuant to 29 U.S.C. § 1381 and denying respondent's demand for a contrary declaratory judgment.

Opinions Below

The opinion of the Court of Appeals is reported at 851 F.2d 578 (13a).[1] The opinion of the District Court is reported at 671 F. Supp. 1000 (26a).

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1988 (24a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The question presented involves 29 U.S.C. §§ 1381, 1383, 1384 and 1398 (3-9a); and, in connection with subsidiary issues included therein, 29 U.S.C. §§ 1301, 1322a, 1369, 1362, 1392 and 1451 (1-9a), and N.Y. Partnership L. §§ 10, 26, 53, 60, 72 and 98 (McKinney 1988) (9-12a).

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[1] References to the Appendix to the Petition are cited herein as "____a".

Statement of the Case

Respondent, Park South Hotel Corporation ("PSHC"), was the sole general partner of a limited partnership organized under the laws of New York State. PSHC and its partners (hereinafter, collectively, the "PSHC partnership"), under the partnership name "Park South Associates", owned and operated the Barbizon Plaza Hotel.

Pursuant to a collective bargaining agreement negotiated by the PSHC partnership's multiemployer bargaining unit (the Hotel Association of New York City), the PSHC partnership was obligated to contribute to petitioner New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund (the "Fund"). The Fund is a multiemployer pension plan under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381 *et seq.*

In August 1981, PSHC and its partners sold 100% of their partnership interests to Donald Trump. The parties amended the certificate of limited partnership and the limited partnership agreement of "Park South Associates" to reflect the withdrawal of PSHC and its partners, and the "admittance" of Trump and Barbizon Plaza Realty Corporation ("BP Realty"),[2] as partners. *See*, 851 F.2d at 580-81 (15-16a); 671 F. Supp. at 1002 (29a). The ownership of the Barbizon Plaza Hotel remained under the partnership name of "Park South Associates". According to respondent, the transaction was structured as a sale of partnership interests, rather than as a direct sale of the hotel, in order to avoid adverse tax consequences. *See*, 581 F.2d at 581 (16a); 671 F. Supp. at 1002 (29a).

Under the purchase agreement, neither Trump nor BP Realty assumed the existing obligations of the PSHC partnership. The purchase agreement provides that Trump "shall not be responsible, as a consequence of the purchase intended hereby, for any obligation between or among the Sellers or for any obligation of the Sellers or any of them to any third party."

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[2] Trump transferred a 1% limited partnership interest to BP Realty. *See*, 671 F. Supp. at 1002 n.3 (29a).

851 F.2d at 581 (16a); 671 F. Supp. at 1001-2 (28a). Affidavits executed prior to the closing, by the president of PSHC and each of its partners, also affirmed that Trump would not be liable for existing obligations. *See*, 671 F. Supp. at 1002 (28a).

Trump and BP Realty (hereinafter, collectively, the "Trump Partnership") continued the business of their predecessors, including the use of the partnership name "Park South Associates". The Trump partnership retained the employees at the hotel, recognized their union as their collective bargaining agent, and contributed to the Fund on their behalf. *See*, 851 F.2d at 578 (16a); 671 F. Supp. at 1002 (30a).

Approximately four months after the sale, the Fund demanded payments totalling $1,016,900 from PSHC for withdrawal liability incurred by the PSHC partnership. *See*, 671 F. Supp. at 1002 (30a). PSHC denied liability. By letter to the Fund dated February 5, 1982, PSHC argued that:

> The partnership interests in Park South Associates were purchased by Donald J. Trump on August 11, 1981. Prior thereto Park South Associates was the owner and operator of the Barbizon Plaza Hotel. It still is. Contributions continue to be made to the Pension Plan for the same employees pursuant to a collective bargaining agreement with the same union.

671 F. Supp. at 1003 (30-31a); *see*, 851 F.2d at 581 (17a). In April 1982, PSHC began making payments to the Fund under protest and reserved the right to dispute its liability.

PSHC filed suit against the Fund to seek a declaratory judgment that the sale of partnership interests did not constitute a withdrawal under MPPAA. The Fund counterclaimed for a declaratory judgment that PSHC and the PSHC Partnership are jointly and severally liable for withdrawal liability. Noting jurisdiction pursuant to 29 U.S.C. § 1451,[3] the District Court

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[3] MPPAA § 1451(a)(1) provides that "[a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of

(footnote continued)

held for the Fund.[4] On appeal, a panel consisting of two judges of the Second Circuit and one judge of the Federal Circuit sitting by designation reversed and remanded the case to the District Court for entry of a declaratory judgment that PSHC is not liable to the Fund for withdrawal liability.

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a party under this subtitle with respect to a multiemployer plan . . . may bring an action". Since it was unclear whether or not PSHC itself was an employer for purposes of standing, the District Court exercised its undisputed subject matter jurisdiction over the Fund's counterclaim and noted "at a minimum, pendent jurisdiction over [PSHC's] claim." 671 F. Supp. at 1001 n.1 (27a).

[4] Both parties had concluded that arbitration of their dispute was not required pursuant to 29 U.S.C. § 1401(a). Noting that this case turns solely on a question of "statutory interpretation with respect to concededly undisputed material facts", the District Court agreed. 671 F. Supp. 1005 n.8 (35a). The Court of Appeals reached the same conclusion based on the absence of factual disputes, the waiver of arbitration by both parties, the timely filing of the suit, and considerations of judicial economy. *See*, 851 F.2d at 582 (18-19a).

Reasons for Granting the Writ

This case involves an important question of statutory construction arising under MPPAA, the federal response to the problems caused by employer withdrawals from multiemployer pension plans. *See*, Point A, *infra*. The questions presented have never been addressed by this Court. We demonstrate below that, if permitted to stand, the decision of the Second Circuit will have harmful consequences far beyond its impact on petitioners: the contribution base of every multiemployer pension plan will be injured or placed at risk, thereby frustrating the intent of Congress and, ultimately, threatening the financial security of millions of present and future retirees. *See*, Points B and C, *infra*. Moreover, the Second Circuit's judicial creation of a new exemption from withdrawal liability conflicts, in principle, with a decision of the Seventh Circuit. *See*, Point D, *infra*. We respectfully submit that the questions presented warrant immediate review by this Court.

A. *Congress Intended the Provisions of MPPAA to Protect Multiemployer Plans from Employer Withdrawals*

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S. Ct. 2709, (1984). To further safeguard payment of such benefits, Congress enacted MPPAA in 1980.

Employer withdrawals from multiemployer pension plans threatened the stability of the plans. The Pension Benefits Guaranty Corporation ("PBGC"), a wholly owned Government corporation which administers plan termination insurance, warned:

> A key problem of ongoing multiemployer pension plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and

> higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage – or force – further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

Textile Workers Pension Fund v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 848 (2d Cir. 1984), *quoting*, Pension Plan Termination Insurance Issues: Hearing Before the Subcomittee on Oversight of the Committee on Ways and Means, House of Representatives, 95th Cong., 2d Sess. 22 (1978).

To alleviate the harm suffered by multiemployer plans, MPPAA "requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan."[5] *R.A. Gray & Co.*, 467 U.S. at 725. "This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Id.* "An employer's past contribution history is considered in determining its proportionate share of unfunded benefits." 851 F.2d at 580 (15a).

The issue which should be settled by this Court relates to the interpretation of MPPAA, § 1383 and its narrow exceptions, §§ 1384 and 1398. § 1383 provides, in pertinent part, that:

> [a] complete withdrawal from a multiemployer plan occurs when an employer –
>
> (1) permanently *ceases to have an obligation to contribute* under the plan, or

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[5] § 1381 imposes liability on an employer for a "complete withdrawal" as defined in § 1383. *See*, 29 U.S.C. § 1381.

(2) permanently ceases all covered operations under the plan.

[Emphasis supplied.]

29 U.S.C. § 1383(a).

The specific exclusions from withdrawal liability concern sales of assets which meet certain stringent requirements (set forth in § 1384), and certain changes in a corporation's business form (defined in § 1398). Both exclusions protect the multiemployer plan against erosion of its contribution base. *First*, § 1384 exempts "a bona fide, arm's length sale of assets to an unrelated party" where (a) the purchaser has an obligation to contribute to the plan at a level substantially the same as that of the seller; (b) for five years after the sale, the purchaser posts a surety bond to the plan, which insures against the possibility of a subsequent withdrawal; and (c) in the contract for sale, the seller agrees to secondary liability upon a withdrawal by the purchaser within five years after the sale. 29 U.S.C. § 1384(a). *See*, 671 F. Supp. at 1004 (34a); *New York State Teamsters Conference Pension & Retirement Fund* v. *St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1007-9 (N.D.N.Y. 1985).

Second, § 1398 excludes certain changes in business form:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—
>
> (1) an employer ceases to exist by reason of—
>
> (A) a change in *corporate* structure described in section 1362(d) of this title, or
>
> (B) a change to an *unincorporated* form of business enterprise,
>
> *if the change causes no interruption in* employer contributions or *obligations to contribute* under the plan . . .
>
> For purposes of this part, a successor or parent corporation or any other entity resulting from any such change shall be considered the original employer.
>
> [Emphasis supplied.]

29 U.S.C. § 1398.[6] When a *corporate* employer changes its business form, the requirement that the obligation to contribute remain uninterrupted is normally satisfied by the successor's liability for the obligation by operation of law. *See, e.g. Ladjevardian* v. *Laidlow-Coggeshall, Inc.*, 431 F. Supp. 834, 838 (S.D.N.Y. 1977) ("A successor corporation is liable for the debts of its predecessor where there is a merger or consolidation of the two firms."). Significantly, § 1398 permits corporate employers to unincorporate because the number of responsible parties would increase, but disfavors non-corporate employers who wish to incorporate because the number of responsible parties would decrease.

In summary, MPPAA imposes withdrawal liability as a remedy for the threat of a "vicious downward spiral" in funding posed to multiemployer plans by employer withdrawals.[7] No provision of MPPAA exempts sales of 100% of the ownership interests in a partnership from withdrawal liability. *See*, 671 F. Supp. at 1008 (40a). As a matter of substantial public interest which affects employers, the plans, employees and their beneficiaries, the questions presented merit resolution by this Court.

B. *The Second Circuit's Failure to Uphold Withdrawal Liability Destroys the Safeguards of MPPAA and Endangers the Stability of Multiemployer Plans*

The Second Circuit held that the sale of 100% of a partnership's ownership interests does not constitute a withdrawal. *See*, 851 F.2d at 582 (19a). By characterizing the Trump partnership as the same employer as the PSHC partnership, the Court of Appeals found that the "obligation to contribute" and "all

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[6] § 1362(d), currently renumbered § 1369(b), defines changes in corporate structure to include mere changes in identity, form or place of organization; liquidations into a parent corporation; and mergers, consolidations or divisions. *See*, 29 U.S.C. § 1369(b).

[7] We note that, as the guarantor of the payment of certain benefits under insolvent multiemployer plans, the PBGC may also be adversely affected by employer withdrawals. *See*, 29 U.S.C. § 1322a.

[8] We demonstrate below that, as a matter of partnership law, the Second Circuit's finding was clearly erroneous. *See*, Point C, *infra*.

covered operations" continued without interruption.[8] *See*, *id.* at 582-83 (19-20a). Although § 1398 is expressly limited to changes in business form by *corporate* employers,[9] the Second Circuit reasoned, by analogy, that the complete change in the ownership of the partnership interests "did not create the problems for the Fund that Congress sought to ameliorate by imposing withdrawal liability." 851 F.2d at 584 (23a).

The District Court recognized the actual consequences of such a holding:

> . . . if the plaintiff were to succeed in its characterization of Park South Associates II as the same employer as Park South Associates I, then *any partnership wishing to sell its assets could easily avoid the stringent requirements set forth in the sale of assets exception* by simply transferring the partnership interests rather than selling its assets outright.
> [Emphasis supplied.]

671 F. Supp. at 1007 (39a).

Prior to the decision of the Second Circuit, an employer seeking to sell its business either complied with § 1384 or paid withdrawal liability based on its contribution history. As we noted above (*see*, Point A, *supra*), § 1384 offers an exception to liability where the purchaser has an obligation to contribute, the purchaser posts a surety bond, and the seller agrees to secondary liability. Significantly, the purchaser's obligation to contribute, in and of itself, is inadequate to avoid a withdrawal.

The additional requirement of a surety bond protects multiemployer plans from the replacement of financially sound original employers by financially weak successors. For example, in a common situation known as a "leveraged buy-out", the purchaser finances its purchase by using the assets of the business

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[9] *See*, 851 F.2d at 583 (22a) (§ 1398 "deals only with changes in corporate structure."); 671 F. Supp. at 1005 n.9 (36a). Respondent has conceded that § 1398 does not apply herein. *See*, 671 F. Supp. at 1005 n.9 (36a), *quoting*, Plaintiff's Memorandum at 30 ("Of course, in the instant case there is not a change in structure.").

to be acquired as collateral for a short-term loan. After the sale is completed, assets of the business are sold to repay the loan.[10] Thus, even if the successor employer (the purchaser) agrees to assume an obligation to contribute, there may be little or no assets to satisfy the liability to the plan upon a subsequent withdrawal. A surety bond insures the plan against the financial weakness of the purchaser.

The requirement of secondary liability further protects multiemployer plans by retaining the original employer (the seller) as a responsible party. Indeed, to increase the likelihood of full recovery by a plan, the provisions of MPPAA consistently maximize the number of parties responsible for any obligation. *First*, § 1301 requires "trades or businesses (whether or not incorporated) which are under common control" to be treated as a "single employer". 29 U.S.C. § 1301(b)(1). Accordingly, each member of the control group is responsible for employer obligations incurred by any of the other members. *Second*, § 1398 excludes changes to unincorporated business forms from withdrawal liability but, significantly, does *not* exempt changes to *incorporated* business forms. Under basic principles of partnership law, partners are personally liable for obligations of their partnership: a creditor of the partnership may seek satisfaction of a debt from the partnership property or from each of the partners.[11] *See*, N.Y. Partnership L. § 26 (McKinney 1988) (hereinafter, "N.Y. Partnership L. §____"). By contrast, under basic principles of corporation law, shareholders are usually *not* personally liable for obligations of their corporation: a creditor of the corporation

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[10] Alternatively, if the loan carries a longer term, the assets of the business become subject to a security interest held by the entity which provided the financing.

[11] In the case of a limited partnership, the general partners are personally liable for obligations of the partnership. *See*, N.Y. Partnership L. § 98 (McKinney 1988) ("A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners"). As the sole general partner of the PSHC partnership, PSHC is liable for any debts incurred by the PSHC partnership. *See*, 671 F. Supp. at 1004-5 (35a).

is generally limited to actions against the corporation.[12] Thus, as stated above (*see*, Point A, *supra*), the § 1398 exemption merely increases the number of responsible parties.

In substance, the sale of 100% of a partnership's ownership interests is indistinguishable from a sale of assets which *fails* to comply with § 1384. The same concerns arise. The obligation to contribute assumed by a successor partnership, composed of completely new partners, is neither the same as nor, in the case of financially weaker new partners, an adequate substitute for the obligation to contribute by the original partnership composed of the old partners. As the District Court pointedly noted:

> It would exalt form over substance, and would clearly be inconsistent with the broad remedial purposes of MPPAA, to find no change in employer status where, as here, *there are no common partners between the two partnerships*, where the new partners have expressly disavowed any obligations of the old partners, and, indeed, where *the only thing the two partnerships have in common is the partnership name*. It simply defies common sense to say that Park South Associates II, a partnership made up of Donald Trump and the Barbizon Plaza Realty Corporation, is the same employer as Park South Associates I, a partnership made up of [PSHC] and several independent limited partners. [Emphasis supplied.]

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[12] A corporation has a separate and distinct existence from that of its shareholders. Significantly, although a partnership (or limited partnership) may sue or be sued in its partnership name, it is *not* a distinct entity from its partners. *See, Caplan* v. *Caplan*, 268 N.Y. 445, 447 (1935) ("A partnership is not, like a corporation, an artificial person created by law and existing independent of the persons who create and control it."); *Chemical Bank of Rochester* v. *Ashenburg*, 94 Misc.2d 64, 67, 405 N.Y.S.2d 175 (Sup. Ct. Monroe Co. 1978). *See also*, N.Y. Partnership L. § 10; commentaries to N.Y. C.P.L.R. §§ 310 and 1025 (McKinney 1988).

671 F. Supp. at 1006 (37a). To find no withdrawal, as the Second Circuit did, causes the loss of the original partners as responsible parties and subjects multiemployer plans to the risk of financially weaker successors.

Inevitably, as a direct consequence of the decision below, future sellers will restructure the sales of their businesses as sales of partnership interests, rather than as direct sales of assets, in order to avoid withdrawal liability *and* compliance with § 1384. *See*, 671 F. Supp. at 1007 (39a) (*quoted*, *supra*). Since the Second Circuit's decision will alter many transactions and render the protections of § 1384 inoperative, this Court should not permit the decision below to stand.

C. *The Second Circuit's Clearly Erroneous Interpretation of Partnership Law Harms Multiemployer Plans in the Precise Manner Which Congress Sought to Prevent*

The Second Circuit believed that, after the sale, Trump and the Trump partnership became liable for the obligations of the PSHC partnership. Distinguishing between a "dissolution" and a "termination" of the partnership business, the Court of Appeals argued:

> Where, as here, the new partners evince an intention to continue the partnership business, there has been no termination and the new partners may be held to be bound by the obligations of the old.

851 F.2d at 582-83 (20a). The Second Circuit concluded that the obligation to contribute continued.[13] *See*, *id.* at 583 (20a).

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[13] Although federal law created withdrawal liability (*see*, § 1381), state law is also relevant. § 1383 defines a "complete withdrawal" as a permanent cessation in an obligation to contribute or all covered operations. As the Second Circuit's attempt to analyze New York partnership law implies, state law may determine whether or not an obligation to contribute has ceased (and, as a result, whether or not a withdrawal has occurred). The respondent itself has noted that a "partnership is a creature of state law, which governs its status as a juridical entity." Brief of Plaintiff-Appellant Park South Hotel Corp., on

(footnote continued)

As a matter of partnership law, this conclusion is clearly erroneous.

"The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." N.Y. Partnership L. § 60. While "[a] conveyance by a partner of his interest in [a] partnership does not of itself dissolve the partnership" (N.Y. Partnership L. § 53), his *withdrawal* does dissolve the partnership. *See*, 1 R. Rowley, *Partnership*, § 31.1 at 592-93 (1960) (hereinafter, "Rowley"). *See also*, Official Comment to Uniform Partnership Act, § 41, 7 U.L.A. ("It is universally admitted that any change in membership dissolves a partnership, and creates a new partnership.").[14] Accordingly, as the Second Circuit recognized, the PSHC partnership dissolved *by operation of law* at the time of PSHC's withdrawal from the partnership.[15] *See*, 851 F.2d at 582 (20a). *See also*, 671 F. Supp. at 1008 (41a); *C.E. Hooper, Inc.* v. *Perlberg, Monness, Williams & Sidel*, 72 A.D.2d 687, 688 (1st Dept. 1979).

N.Y. Partnership L. § 72 governs the liability of persons who continue, *without liquidation*, the business of a partnership dissolved by a change in personnel. Whenever a partnership dissolves and its business is continued *by one or more of its partners*, alone or with others, the creditors of the dissolved

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appeal to the Second Circuit, at 20 n.3 (citing cases). Moreover, § 1392 defines an "obligation to contribute" as an obligation derived from a collective bargaining agreement (or applicable labor-management relations law), thereby directly importing state contract law principles into the analysis. *See*, 29 U.S.C. 1392.

[14] New York has adopted the Uniform Partnership Act. N.Y. Partnership L. § 72 corresponds to Uniform Partnership Act, § 41, 7 U.L.A.

[15] The affidavits executed by the president of PSHC and each of its partners acknowledged that the sale to Trump could "terminate" the PSHC partnership. *See*, 671 F. Supp. at 1002 (29a). Indeed, the PSHC partnership also dissolved by the terms of the limited partnership agreement, dated December 21, 1972, which provides that "[t]he withdrawal of the General Partner shall dissolve the Partnership" (Art. VI, §6.01). Appendix, on appeal to the Second Circuit, at 878.

partnership automatically become creditors of the successor partnership (or sole proprietorship). *See*, N.Y. Partnership L. §§ 72(1), (2), (3), (5) and (6). *See also*, Official Comment to Uniform Partnership Act, § 41(1), 7 U.L.A.

By contrast, if a partnership dissolves and its business is continued *solely by one or more third persons*, the creditors of the dissolved partnership do *not* necessarily become creditors of the partnership (or sole proprietorship) continuing the business. N.Y. Partnership L. § 72(4) provides:

> When all the partners or their representatives assign their rights in partnership property to one or more third persons *who promise to pay the debts* and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership, continuing the business. [Emphasis supplied.]

The official comment to this section states in relevant part:

> The paragraph does not apply to the case where the third person or persons do not promise to pay the debts of the dissolved partnership. In that case *the creditors of the dissolved partnership have no claim on the partnership continuing the business or its property* unless the assignment can be set aside as a fraud on creditors, or is affected by a Sales in Bulk Act. [Emphasis supplied.]

Official Comment to Uniform Partnership Act, § 41(4), 7 U.L.A. *See*, *Dodek* v. *CF 16 Corp.*, 537 A.2d 1086, 1098-1100 (D.C. 1988); *Williams* v. *Stevens*, 11 A.2d 433, 434-35 (N.J. Ch. 1939), *aff'd*, 127 N.J. Eq. 8, 11 A.2d 435 (N.J. 1940);[18] *see also*, Rowley, § 41.4 at 801.

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[18] The District of Columbia and New Jersey have also adopted the Uniform Partnership Act; accordingly, *Dodek* and *Williams* interpret statutory provisions which are identical to N.Y. Partnership L. § 72(4).

In the instant case, Trump and BP Realty continued the business of the dissolved partnership *without* the participation of any remaining partners: *all* of the partners of the PSHC partnership withdrew. *See*, 671 F. Supp. at 1006 (37a) ("there are no common partners between the two partnerships"). Trump and BP Realty did *not* promise to pay the debts of the PSHC partnership; indeed, "the new partners have expressly disavowed any obligations of the old partners" to third-party creditors. *Id.* (37a). Thus, under New York law (and the Uniform Partnership Act), neither Trump nor the Trump partnership is liable to creditors for partnership obligations of the PSHC partnership.[17]

Arguing that agreements between sellers and purchasers cannot affect liabilities imposed by federal law, the Second Circuit suggested that the denial of liability by Trump and BP Realty reflects a mere indemnification clause, and does not bar a claim against them by the Fund. *See*, 851 F.2d at 583 (21a). However, such reasoning confuses withdrawal liability with obligations to contribute. *See*, n. 13, *supra*. Although Trump and BP Realty cannot avoid a withdrawal liability imposed upon them by MPPAA, they could and did refuse to assume the PSHC partnership's obligation to contribute, a liability created by a

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[17] The cases cited by the Second Circuit (*see*, 851 F.2d at 583 (20a)), in support of its misconstruction of New York law, are entirely inapplicable to the instant action. None of the cases involved a 100% change in partnership interests or a claim by a third-party creditor: indeed, the cases cited by the Court of Appeals deal solely with relations *between* partners. *See*, *Newburger, Loeb & Co.* v. *Gross*, 611 F.2d 423, 426-27 (2d Cir. 1979) (counterclaim by former general partner and former limited partners against remaining partners who wrongfully transferred partnership assets to successor corporation); *Vann* v. *Kriendler, Relkin & Goldberg*, 54 N.Y.2d 936, 937-38, 445 N.Y.S.2d 139, 429 N.E.2d 817 (1981) (action by former partner against successor firm composed of remaining partners for an accounting and damages); *Gelder Medical Group* v. *Webber*, 41 N.Y.2d 680, 683, 394 N.Y.S.2d 867, 363 N.E.2d 573 (1977) (action by a partnership to enforce restrictive covenant not to compete against defendant who had been expelled as a partner); *Lanier* v. *Bowdoin*, 282 N.Y. 32, 36-37, 24 N.E.2d 732 (1939) (action by limited partner, after liquidation of partnership, to recover capital contribution from solvent general partner); *Levy* v. *Leavitt*, 257 N.Y. 461, 464-66, 178 N.E. 758 (1931) (action by plaintiff

(footnote continued)

collective bargaining agreement. As this Court has recognized, although successor employers may have a duty to recognize and bargain with their employees' union, "they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them." *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 284, 92 S.Ct. 1571 (1972). Accordingly, the Trump partnership is responsible solely for its *own* contribution history, pursuant to its *own* arrangements with its employees' union. *See*, 671 F. Supp. at 1002 (30a).

In a case submitted to the PBGC, a withdrawing employer sold its name, plant, employees and inventory, to a purchaser who continued the business. Significantly, the purchaser did not assume the obligation to contribute of the seller. In concluding that a withdrawal by the selling party had occurred, the PBGC stated:

> In your case however, the seller's obligation to the plan would totally cease as of the date of the sale. In this situation, Congress intended the seller to pay his allocated share of the plan's unfunded vested benefits, i.e., that share which was accrued during his participation in the plan. *The purchaser has no obligation for this past liability and is treated as a new employer contributing to the plan with respect to the transferred operations.* Thus, unless the seller is considered to have withdrawn from the plan, the seller's share of the plan's unfunded vested benefits would fall on the remainder of the contributing employers. This is precisely the result Congress sought to avoid with the passage of the Multiemployer Act.
> [Emphasis supplied.]

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against former partner in joint venture for an accounting). According to the plain language of N.Y. Partnership L. § 72, whether or not a dissolved partnership subsequently liquidates its affairs and "terminates" its business is completely irrelevant to the question of its successor partnership's liability to third-party creditors.

Opinion Letter 82-40, December 27, 1982.[18]

The decision below bars recovery of withdrawal liability from PSHC and the PSHC partnership. At the same time, despite the continued use of the partnership name "Park South Associates", the Trump partnership did not assume the obligation to contribute of the PSHC partnership. Thus, contrary to the suggestion of the Court of Appeals (*see*, 851 F.2d at 583 (21a)), the Fund cannot assess Trump and the Trump partnership for the contribution history of the PSHC partnership upon a subsequent withdrawal.[19] Since this result is plainly inconsistent with the purposes of MPPAA, this Court should immediately review the questions presented.

D. *The Second Circuit's Judicial Creation of a New Exception to Withdrawal Liability Upsets the Statutory Scheme of MPPAA and Represents a Conflict in Principle with a Decision of the Seventh Circuit*

In *Central States Southeast and Southwest Areas Pension Fund* v. *Bellmont Trucking Co., Inc.*, 788 F.2d 428, 430-31 (7th Cir. 1986), the defendant employer filed a bankruptcy petition and thereby permanently ceased to have an obligation to contribute.

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[18] With respect to the above opinion letter, the District Court noted:

> The facts of this action are even more compelling with respect to the imposition of withdrawal liability than those set forth in the opinion letter because here the purchasing partner *specifically* declined to assume any of the selling partners' liabilities. [Emphasis in original.]

671 F. Supp at 1007 n.11 (38a). We believe that, upon the invitation of this Court, the PBGC would confirm the analysis of the District Court.

[19] As alternative relief, if the PSHC partnership were not liable for a withdrawal, the Fund sought a declaratory judgment that the Trump partnership would be responsible for its predecessor's contribution history. By

(footnote continued)

However, the defendant argued that it should be exempt from withdrawal liability because its former employees who still worked had contributions made on their behalf by their new employers. *See, id.* at 430. According to the defendant, the plaintiff multiemployer plan thus continued to receive contributions at the same level as it did prior to the bankruptcy, and would be unjustly enriched by imposition of withdrawal liability. *See, id.* at 434.

Finding no applicable exemption from withdrawal liability in MPPAA, the Seventh Circuit firmly rejected the judicial creation of an exception:

> [E]ven if we could be persuaded that the policy objectives of the MPPAA would not be served by imposing withdrawal liability in this case, we would have to reject the defendant's argument. Congress did not merely select a broad policy goal and instruct the courts to achieve that objective. Rather, Congress itself decided what rules, and exceptions to those rules, would best achieve its goals. The statutory language is the most reliable indicator of congressional intent. We have held that "*the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.*" Hence we are bound by the particular rules enacted by Congress and are not free to carve out our own exceptions merely because we believe they would not undermine Congress' goals. [Emphasis supplied; citations omitted.]

Id. at 433. We respectfully submit that these principles would compel the Seventh Circuit to resolve the questions presented in a conflict with the decision below by the Second Circuit.

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stipulation and order dated May 4, 1984, the claim against the Trump partnership was dismissed without prejudice and without costs. Consequently, Trump and the Trump partnership are not bound by any language in the decision below, and, upon a subsequent withdrawal, may contest any attempt to assess them for the contribution history attributable to their predecessors.

Indeed, the District Court relied on these principles to find withdrawal liability:

> Congress enacted a carefully drawn and reasonably restrictive scheme of situations in which withdrawal liability could be avoided. In the sale of assets exception, Congress specifically required the purchasing company to post a surety bond. In the change in form exception, Congress required that the resulting entity specifically assume the old corporation's obligation to contribute to the Fund. Congress could have created a further exception to withdrawal liability where liability for the former employer's contribution history is imposed as a matter of state law, but chose not to do [so]. In the face of that statutory scheme, the Court is not free to judicially create a new exception to the scheme arising out of the fortuitous circumstance that the laws of one state, on the unique facts of this action, may impose upon the new employer a liability for the old employer's contribution history. This is especially true since Congress expressly provided exceptions for a corporate merger and for a sale of assets but did not provide an exception for a transfer of 100% of a partnership's interests. *See Central States, supra*, 788 F.2d at 433.

671 F. Supp. at 1007-8 (40a). The District Court refused to exempt sales of partnership interests in light of the clear legislative intent to impose liability. *See, St. Lawrence Transit Mix Corp., supra*, 612 F. Supp. at 1009 (MPPAA "was enacted as a strict liability measure.").

The guidance of this Court would avoid a future conflict between the Second and Seventh Circuits, and would clarify the construction of a major federal statute. Accordingly, the questions presented should be addressed by this Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

September 27, 1988

Respectfully submitted,

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APPENDIX

29 U.S.C. § 1301. Definitions

(a) For purposes of this subchapter, the term –

* * *

(3) "multiemployer plan" means a plan –

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

except that, in applying this paragraph –

(i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and

(ii) for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in section 414(f) of Title 26 as in effect immediately before such date;

(4) "corporation", except where the context clearly requires otherwise, means the Pension Benefit Guaranty Corporation established under section 1302 of this title;

* * *

(11) "contribution base unit" means a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury; and

* * *

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

(As amended Pub.L. 96-364, Title IV, § 402(a)(1)(A)-(E), Sept. 26, 1980, 94 Stat. 1296; Pub.L. 99-272, Title XI, § 11004, Apr. 7, 1986, 100 Stat. 238; Pub.L. 100-203, Title IX § 9312(b)(4)5, 9313(a)(2)(F), Dec. 22, 1987, 101 Stat. 1330-363, 1300-36(s).)

29 U.S.C. § 1322a. Multiemployer plan benefits guaranteed

(a) Benefits of covered plans subject to guarantee

The corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a multiemployer plan —

(1) to which section 1321 of this title applies, and

(2) which is insolvent under section 1426(b) or 1441(d)(2) of this title.

* * *

(Pub.L. 93-406, Title IV, § 4022A, as added Pub.L. 96-364, Title I, § 102, Sept. 26, 1980, 94 Stat. 1210.)

29 U.S.C. § 1369. Treatment of transactions to evade liability; corporate reorganization

* * *

(b) Effect of corporate reorganization

For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

(1) Change of identity, form, etc.

If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation

If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division

If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

(Pub.L. 93-406, Title IV, § 4069, as added Pub.L. 99-272, Title XI, § 11013(a), Apr. 7, 1986, 100 Stat. 260.)

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section –

• • •

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

• • •

(Pub.L. 93-406, Title IV, § 4201, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1217.)

29 U.S.C. § 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

• • •

(Pub.L. 93-406, Title IV, § 4203, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1384. Sale of assets

(a) Complete or partial withdrawal not occurring as a result of sale and subsequent cessation of covered operations or cessation of obligation to contribute to covered operations; continuation of liability of seller

(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the "seller") under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an

unrelated party (hereinafter in this section referred to as the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if –

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of –

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser—

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due,

then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3)(A) If all, or substantially all, of the seller's assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1)(C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

(B) If only a portion of the seller's assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

(b) Liability of purchaser

(1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

(2) If the plan is in reorganization in the plan year in which the sale of assets occurs, the purchaser shall furnish a bond or escrow in an amount equal to 200 percent of the amount described in subsection (a)(1)(B) of this section.

* * *

(d) Definition

For purposes of this section, the term "unrelated party" means a purchaser or seller who does not bear a relationship to the seller or purchaser, as the case may be, that it described in section 267(b) of Title 26, or that is described in regulations prescribed by the corporation applying principles similar to the principles of such section.

(Pub.L. 93-406, Title IV, § 4204, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1220.)

29 U.S.C. § 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising --

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

* * *

(Pub.L. 93-406, Title IV, § 4211, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233.)

29 U.S.C. § 1398. **Withdrawal not to occur merely because of change in business form or suspension of contributions during labor dispute**

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

(1) an employer ceases to exist by reason of—

(A) a change in corporate structure described in section 1362(d) of this title, or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan,

* * *

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

References in Text. Section 1362(d) of this title, referred to in par. (1)(A), was amended by Pub.L. 99-272, Title XI, § 11011(a)(2), Apr. 7, 1986, 100 Stat. 253, and as so amended relates to liability to section 1342 trustee and not to changes in corporate structure. See section 1369(b) of this title.

(Pub.L. 93-406, Title IV, § 4218, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1236.)

29 U.S.C. § 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or any employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

* * *

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except the State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

* * *

(Pub.L. 93-406, Title IV, § 4301, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1263.)

N.Y. Partnership L. § 10 (McKinney 1988). Partnership defined

1. A partnership is an association of two or more persons to carry on as co-owners a business for profit.

2. But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter;

but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

N.Y. Partnership L. § 26 (McKinney 1988). Nature of partner's liability

All partners are liable

1. Jointly and severally for everything chargeable to the partnership under sections twenty-four and twenty-five.

2. Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

N.Y. Partnership L. § 53 (McKinney 1988). Assignment of partner's interest

1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

* * *

N.Y. Partnership L. § 60 (McKinney 1988). Dissolution defined

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

N.Y. Partnership L. § 72 (McKinney 1988). Liability of persons continuing the business in certain cases

1. When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

2. When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

3. When any partner retires or dies and the business of the dissolved partnership is continued as set forth in subdivisions one and two of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

4. When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership, continuing the business.

5. When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section sixty-nine, paragraph (b) of subdivision

two, either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

6. When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

* * *

N.Y. Partnership L. § 98 (McKinney 1988). Rights, powers and liabilities of a general partner

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate.

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(c) Confess a judgment against the partnership.

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

PARK SOUTH HOTEL CORPORATION,

Plaintiff-Appellant,

v.

NEW YORK HOTEL TRADES COUNCIL
and Hotel Association of New York
City, Inc., Pension Fund, Defendant-Appellee.

No. 947, Docket 87-9025.

United States Court of Appeals,
Second Circuit.
Argued March 28, 1988.
Decided June 29, 1988.

Andrew Irving, New York City (Robinson, Silverman, Pearce, Aronsohn & Berman, New York City), for plaintiff-appellant.

Michael Lesch, New York City (Christopher J. Sues, Clifford L. Davis, Shea & Gould, New York City), for defendant-appellee.

Before FEINBERG, Chief Judge, KEARSE and FRIEDMAN,* Circuit Judges.

FRIEDMAN, Circuit Judge:

This is an appeal from a declaratory judgment of the United States District Court for the Southern District of New York that the appellant Park South Hotel Corporation and Park South Associates are jointly and severally liable for withdrawal liability payments under the Multiemployer Pension Plan Amendments Act of 1980 (MP-PAA), 29 U.S.C. § 1381 et seq. (1982). *Park South Hotel Corp. v. New York Hotel Trades Council and Hotel Ass'n of New York City, Inc., Pension Fund*, 671 F.Supp. 1000 (S.D.N.Y. 1987). We reverse.

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* Daniel M. Friedman, Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

I

A. We recently summarized the background and pertinent provisions of MPPAA in *ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 880-81 (2d Cir. 1988): MPPAA was enacted by Congress in September 1980 for "[t]he primary purpose of . . . protect[ing] retirees and workers who are participants in [multiemployer] plans against the loss of their pensions." In particular, Congress was concerned that as of 1980:

> (1) the magnitude of the risks and the potential exposure of the [multiemployer plan] system are intolerably high; and (2) existing law and particularly the plan termination insurance provisions are inadequate to assure financially sound multiemployer plans, may accelerate declines and further weaken and hasten the termination of financially weak plans. . . . [T]here are serious defects in current law which undermine the benefit security of multiemployer plan participants.

Thus, in *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939, 943 (2d Cir. 1985), we pointed out that "[t]he policy of the MPPAA . . . was to protect the interests of participants and beneficiaries in financially distressed multiemployer plans and to encourage the growth and maintenance of multiemployer plans."

Under MPPAA an employer who withdraws from a multiemployer plan, with certain exceptions, is assessed "withdrawal liability," that is, the employer is required to continue funding its proportionate share of the plan's unfunded vested benefits. 29 U.S.C. §§ 1381, 1391. The purpose of withdrawal liability "is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers." . . . .

When an employer withdraws form a multiemployer plan, the plan sponsor, that is, the entity maintaining the plan, must

determine the amount of the employer's withdrawal liability, notify the employer of the amount and make a demand for payment. [Citations omitted.]

[1,2] An employer's withdrawal liability is equal to the employer's proportionate share of the plan's unfunded vested employee benefits. The unfunded vested benefits are calculated as the difference between the present value of vested benefits and the current value of the pension plan's assets. See 29 U.S.C. §§ 1381, 1391 (1982); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725, 104 S.Ct. 2709, 2715, 81 L.Ed.2d 601 (1984). An employer's past contribution history is considered in determining its proportionate share of unfunded benefits. *Park South Hotel Corp.*, 671 F.Supp. at 1004.

B. The facts in this case are undisputed. The appellant, Park South Hotel Corporation (Park South), was the sole general partner of Park South Associates (the partnership), a limited partnership organized under the laws of New York. The partnership owned the Barbizon Plaza Hotel (Hotel). The partnership was a member of a multiemployer bargaining unit, the Hotel Association of New York City (Hotel Association). Pursuant to a collective bargaining agreement between the Hotel Association and the union, the partnership was required to contribute to the appellee New York Hotel Trades Council and Hotel Association of New York City, Inc., Pension Fund (the Fund). The Fund is a multiemployer pension plan under MPPAA.

The Hotel Association and the union regarded the partnership as the employer. The union directed complaints filed against the management of the Hotel to the partnership. The general partner, Park South, never was a member of the Hotel Association employers' bargaining unit. The member was the partnership in its trade name, Barbizon Plaza Hotel.

In August 1981, Park South and all the limited partners sold their partnership interests to Donald Trump. Trump became the new general partner, and Barbizon Plaza Realty Corporation and Trump became the new limited partners. To effectuate the sale of the partnership interests, the parties executed an Amended

and Restated Certificate of Limited Partnership, and an Amended Partnership Agreement, for Park South Associates, which recited that the old partners will have withdrawn from, and that Trump and Barbizon Plaza Realty would be "admitted" as partners of Park South Associates. The amended Partnership Agreement and Certificate recognized that the partnership would continue.

The purchase agreement provided that Trump "shall not be responsible, as a consequence of the purchase intended hereby, for any obligation between or among the Sellers or for any obligation of the Sellers or any of them to any third party."

The sale of the partnership interests transferred control and management of the Hotel from the former general partner, Park South Corporation, to the new general partner, Donald Trump. The partnership, Park South Associates, continued to own the Hotel.

The transaction was structured as a sale of the partnership interests rather than as a direct sale of the Hotel because a direct sale would have resulted in substantial real estate transfer taxes and an increase in real property taxes.

After the sale, the partnership, through its new partners, agreed to recognize the union as the collective bargaining agent of the Hotel employees. The partnership continued its payments to the Fund.

Although following the sale Park South wrote a letter to the union purporting to dismiss all the Hotel's employees, the new management retained all the Hotel's employees. The district court noted that following the sale, the partnership "agreed to recognize the Union as the collective bargaining agent of the Hotel employees" and "agreed to continue [the employees'] seniority for purposes of lay-offs, vacations, personal days, bereavement leave, jury duty absence, sick days, leaves of absences, severance pay, and other conditions of employment that are non-economic in nature." 671 F.Supp. at 1002, and n. 4.

Approximately four months after the sale, the Fund demanded payment from Park South for withdrawal liability of approximately $1 million. Park South denied liability. It argued that prior to the sale of the partnership interests, "Park South Associates was the owner and operator of the Barbizon Plaza Hotel. It still is. Contributions continue to be made to the Pension Plan for the same employees pursuant to a collective bargaining agreement with the same union." *Park South Hotel Corp.*, 671 F.Supp. at 1003. In April 1982, Park South began making quarterly payments to the Fund under protest and reserved the right to dispute its withdrawal liability.

C. Park South then filed the present suit against the Fund, seeking a declaratory judgment that it had not incurred withdrawal liability under MPPAA by reason of the sale of the partnership interest because that sale did not constitute a "withdrawal" under the Act. The Fund counterclaimed for a declaratory judgment that Park South and Park South Associates (which it described as a "former New York limited partnership") were jointly and severally liable to the Fund for withdrawal liability. After an evidentiary hearing, the district court held for the Fund and granted the following declaratory judgment:

> Park South Corporation and Park South Associates I are jointly and severally liable to the Fund for withdrawal liability pursuant to 29 U.S.C. § 1381.

Id. at 1009.

The court held, as the parties agreed, that the dispute was not required to be arbitrated. 671 F.Supp. at 1005 n. 8. See part II below. The court ruled that Park South Associates had withdrawn from the Fund when the partners sold their interests to Trump. The court agreed with the Fund that Park South Associates "permanently ceased covered operations and permanently ceased to have an obligation to contribute to the Fund following the transfer of the partnership interests." *Id.* at 1006 (footnote omitted). The court stated:

> It would exalt from over substance, and would clearly be inconsistent with the broad remedial purposes of MPPAA, to find no change in employer status

> where, as here, there are no common partners between the two partnerships, where the new partners have expressly disavowed any obligations of the old partners, and, indeed, where the only thing the two partnerships have in common is the partnership name. It simply defies common sense to say that Park South Associates II, a partnership made up of Donald Trump and the Barbizon Plaza Realty Corporation, is the same employer as Park South Associates I, a partnership made up of Park South Corporation and several independent limited partners.

Id.

II

[3] The Act provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under," among other provisions, the provision (29 U.S.C. § 1381 (1982)) governing employer withdrawal from such a plan, "shall be resolved through arbitration." 29 U.S.C. § 1401(a) (1982). Despite the breadth of this language, we have recognized that not every dispute over withdrawal liability necessarily must be arbitrated. *T.I.M.E.-DC v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939 (2d Cir. 1985).

[4] In the present case, both parties concluded that arbitration was not required. The district court agreed on the ground that the resolution of the dispute turned solely on a question of statutory interpretation. 671 F.Supp. at 1005 n. 8. Although neither party has appealed that ruling, we address the issue briefly, lest our decision be read as adopting the district court's rationale on this point.

In *T.I.M.E.-DC*, we held that "the arbitration provisions of MPPAA do not constitute an absolute bar to federal jurisdiction but instead constitute an exhaustion of administrative remedies requirement." *ILGWU Fund*, 846 F.2d at 887. In the

present case, we conclude that exhaustion of the arbitration remedy is not required because (1) this case presents no factual issues but only legal questions of statutory interpretation, (2) the parties agreed that arbitration was not required, (3) the suit was filed before the time for invoking arbitration had expired, and (4) judicial economy would not be served by remanding the case at this late stage for arbitration, which almost certainly would be followed by further judicial proceedings. We intimate no view on whether arbitration would be required in a case which all of these factors were not present, or which involved some of these, and also other factors. *Cf. ILGWU Fund* (arbitration required).

III

[5] MPPAA imposes withdrawal liability "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal. . . ." 29 U.S.C. § 1381(a) (1982). The Act further provides that

> a complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan.

29 U.S.C. 1383(a) (1982).

We conclude that under this statutory text no withdrawal from the Plan occurred when the partners of Park South Associates sold their partnership interests to Trump.

A. At all pertinent times, both before and after the sale, it was the partnership, not Park South Hotel Corporation (the general partner before the sale), that was the "employer." Before the sale it was the partnership that made the payments to the Fund, and the partnership continued to make those payments

after the sale. At all times before and after the sale, the partnership owned and held title to the Hotel. The partnership continued its existing relationship with the union and with its employees, who continued to work for it, on the same terms and conditions, after the sale. Despite the changes in its membership, the partnership continued to function the same way it had functioned before the sale.

While technically a partnership is dissolved under New York law any time a partner ceases to be "associated in the carrying on as distinguished from the winding up of the business," N.Y. Partnership L. § 60 (McKinney 1948), dissolution does not "terminate[]" the partnership in the absence of a winding up of the partnership affairs, *id.* § 61. Where, as here, the new partners evince an intention to continue the partnership business, there has been no termination and the new partners may be held to be bound by the obligations of the old. *See Newburger, Loeb & Co. v. Gross*, 611 F.2d 423 (2d Cir. 1979); *Vann v. Kreindler, Relkin & Goldberg*, 54 N.Y.2d 936, 445 N.Y.S.2d 139, 429 N.E.2d 817 (1981); *Gelder Medical Group v. Webber*, 41 N.Y.2d 680, 394 N.Y.S.2d 867, 363 N.E.2d 573 (1977); *Lanier v. Bowdoin*, 282 N.Y. 32, 24 N.E.2d 732 (1939); *Levy v. Leavitt*, 257 N.Y. 461, 178 N.E. 758 (1931).

In sum, the partnership continued its "obligation to contribute under the plan," and it continued "all covered operations under the plan." The sale of the partnership interest was not "a complete withdrawal [by the partnership] from a multiemployer plan" under 29 U.S.C. § 1383.

[6] B. The district court gave considerable weight, as does the Fund here, to the fact that the sales agreement provided that Trump would not be liable for any obligation of the sellers to any third party. The court stated:

> In the instant case, according to the unambiguous terms of the purchase agreement, the purchasing partners did not assume any of the selling partner's liabilities, including their liability for the former partnership's contribution history up to that point. As a

> consequence, when and if Park South Associates II withdraws from the Fund at a later time, Park South Associates II's withdrawal liability will not be calculated with reference to the old partnership's contribution history. Thus, if withdrawal liability is not imposed upon Park South Associates I at this time, the burden of funding Park South Associates I's proportionate share of the unfunded liabilities will fall on the remaining contributing employers in the Fund.

671 F.Supp. at 1006.

The determination whether the sale of the partnership interests constituted a "withdrawal" of the "employer" (the partnership) from the plan is governed by the federal Act. The parties' agreement that Trump would not be liable for any debts of the selling partners to third persons does not affect the liability of the partnership to the Fund, which federal law created and the determination of which federal law governs. The parties cannot by agreement change or eliminate any liability that federal law imposes upon the partnership.

If at some future time the Fund attempts to impose withdrawal liability upon the partnership, and Trump as the general partner is required to pay that liability, he may have a claim against the selling partners. The allocation of liability between the old and new partners for the partnership's withdrawal obligation for the period prior to the sale is a matter between Trump and the old partners. It does not affect the question whether under MPPAA the sale of the partners' interests constituted a withdrawal from the plan by the partnership.

C. Our conclusion that no employer withdrawal occurred in this case is further supported by 29 U.S.C. § 1398 (1982), which states:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

> (1) an employer ceases to exist by reason of—
>
> (A) a change in corporate structure described in section 1362(d) of this title [change of identity, form, or place, and corporate reorganizations], or
>
> (B) a change to an unincorporated form of business enterprise,
>
> if the change causes no interruptions in employer contributions or obligations to contribute under the plan....
> For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

This provision does not directly cover the present case because it deals only with changes in corporate structure. It shows, however, that Congress did not intend to treat, as an employer withdrawal from a plan, mere changes in the form or structure of an employer that do not alter the employer's basic relation with, participation in, or obligation to, the plan or change the nature of the employer's operations. As the House Report on the bill stated, a

> withdrawal would not occur, however, where an employer ceases to exist by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the employer's contributions to the plan or the employer's obligations under the plan.

H.R.Rep. No. 869, pt. 1, at 73-74, *reprinted in* 1980 U.S. Code & Admin. News 2918, 2942. *See also*, H.R.Rep. No. 869, pt. 2, at 16, *reprinted in* 1980 U.S. Code & Admin. News at 3005-06 (and example provided).

If the employer in this case had been a corporation and the parties had accomplished a similar change in ownership, section 1398 indicates that there would have been no withdrawal. It is unlikely that Congress intended a different result when a

similar structural change occurred, merely because the employer was a partnership rather than a corporation. To the contrary, the change in ownership of the partnership interests in this case had the same effect as the change in corporate structure that Congress stated in section 1398 would not constitute a withdrawal, namely one that causes "no interruptions in employer contributions or obligations to contribute under the plan."

The Fund has not explained how imposing withdrawal liability upon the partnership in this case is necessary to, or even would further, the congressional purpose underlying MPPAA "to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan. . . ." H.R.Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2935. As we have shown, the partnership continued to remain liable to the Fund and has continued to make payments to the Fund despite the change in the ownership of the partnership interests. In these circumstances the sale of the partnership interests did not create the problems for the Fund that Congress sought to ameliorate by imposing withdrawal liability.

CONCLUSION

The declaratory judgment of the district court that Park South Hotel Corporation and Park South Associates are jointly and severally liable to the Fund for withdrawal liability is reversed, and the case is remanded to that court for entry of a declaratory judgment that they are not liable to the Fund for withdrawal liability.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and eighty-eight.

Present: Hon. Wilfred Feinberg, Ch. J
Hon. Amalya L. Kearse
Hon. Daniel M. Friedman*

Circuit Judges,

PARK SOUTH HOTEL CORPORATION, Plaintiff-Appellant, - V - NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC., PENSION FUND, Defendant-Appellee,	87-9025

Appeal from the United States District Court for the Southern District of New York.

This court came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is

* Daniel M. Friedman, Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

By: ARTHUR HELLER,
Deputy Clerk

PARK SOUTH HOTEL
CORP., Plaintiff,

v.

NEW YORK HOTEL TRADES COUNCIL
AND HOTEL ASSOCIATION OF NEW
YORK CITY, INC. PENSION FUND,
Defendant.

Vito J. PITTA and Albert A. Formicola as
Trustees of New York Hotel Trades
Council and Hotel Association of New
York City, Inc. Pension Fund, Additional
Counter-claim Plaintiffs,

v.

PARK SOUTH ASSOCIATES, Formerly a
New York Limited Partnership,
Additional Counter-claim Defendant.

No. 82 Civ. 7554 (JES).

United States District Court,
S.D. New York.

Oct. 23, 1987.

Robinson, Silverman, Pearce, Aronsohn &
Berman, New York City (Michael O'Toole and
Matthew Silverman, of counsel), for plaintiff.

Shea & Gould, New York City (Michael Lesch,
of counsel), for defendant and additional
counter-claim plaintiffs.

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiff, Park South Hotel Corporation ("Park South Corporation"), brings this action seeking a judgment declaring that

the withdrawal liability provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1982), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA" or "the Act"), 29 U.S.C. §§ 1381 *et seq.* (1982), are not applicable to the facts of this case. *See* Amended Complaint for Declaratory Relief ("Complaint") at ¶ 1.

The defendant is the New York Hotel Trades Council and Hotel Association of New York City Inc. Pension Fund (the "Fund"). The Fund is a multiemployer pension plan within the meaning of MPPAA. The Fund counterclaims seeking a judgment declaring that the plaintiff and Park South Associates, described in the counterclaim as a "former New York limited partnership," are jointly and severally liable to the Fund for withdrawal liability pursuant to MPPAA. *See* Answer to Amended Complaint and Counterclaims ("Answer") at ¶ 5740. Vito J. Pitta and Albert A. Formicola, as trustees for the Fund (the "Trustees"), join the counterclaim as additional plaintiffs.[1]

The Court has held a hearing[2] and both parties have filed post-hearing briefs. For the reasons which follow, the Court denies plaintiff's request for a declaratory judgment and grants the request of defendant and the additional counterclaim plaintiffs for a declaratory judgment.

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[1] MPAA provides that "[a] plan fiduciary, [or] employer. . .who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan. . .may bring an action." *See* 29 U.S.C. § 145(a)(1) (1982). Initially, the defendant argued that the Court lacked subject matter jurisdiction over this action because the plaintiff was not an employer and could not, therefore, maintain the action. However, the Trustees clearly may bring the counterclaim as plan fiduciaries. Thus, all parties and the Court now agree that the Court has subject matter jurisdiction over the counterclaim and, therefore, at a minimum, pendent jurisdiction over the plaintiff's claim.

[2] The purposes of that hearing were to determine whether the plaintiff was an "employer" within the meaning of MPPAA and whether there were any issues of fact with respect to the merits of this action. Both of these issues had possible relevance to the question of whether the instant dispute must be arbitrated.

I. BACKGROUND

The following facts are the sole facts which are material to this action. These facts are undisputed.

Until August 11, 1981, plaintiff Park South Corporation was the sole general partner of Park South Associates, a limited partnership organized under the laws of the State of New York. Park South Associates owned the Barbizon Plaza Hotel ("the Hotel").

Park South Associates was a member of the Hotel Association of New York City ("Hotel Association"), an employer bargaining association. Pursuant to a bargaining agreement between the Hotel Association and the New York Hotel Trades Council, AFL-CIO ("the Union"), Park South Associates was obliged to contribute to the defendant Fund on behalf of its employees at the Hotel.

On August 11, 1981, Park South Corporation and all of the limited partners in Park South Associates executed a Purchase Agreement selling 100% of the partnership interests in Park South Associates to Donald Trump. *See* Plaintiff's Exhibit ("PX") 8 at ¶ 3. It is this transaction and the circumstances surrounding this transaction which the Fund claims give rise to Park South Corporation's withdrawal liability. The details of this transaction are set forth below.

In addition to providing that Donald Trump would purchase 100% of the partnership interests, the Purchase Agreement provided that Trump "shall not be responsible, as a consequence of the purchase intended hereby, for any obligation between or among the [former partners] or for *any obligation of the [former partners] or any of them to any third party.*" *See* PX 8 at ¶ 18(BB)(v) (emphasis added). Moreover, just prior to the closing of the Purchase Agreement, the President of Park South Corporation and each of the former limited partners executed affidavits reaffirming that Mr. Trump would not be liable for any obligations of the selling partners to any third parties. *See* Defendant's Exhibit ("DX") J at ¶ 7(v); *see* also DX G.

These affidavits also warranted that Park South Associates is a "validly existing New York limited partnership, which has not been terminated by operation of law, *except as same may be terminated by virtue of said Assignment of Partnership Interests.*" *See* DX J at ¶ 3 (emphasis added). The affidavits also stated that they were executed "for the purpose and with the intent of inducing Donald J. Trump" to purchase the partnership interests. *See id.* at ¶14.

To effectuate the sale of the partnership interests to Donald Trump, the parties to the sale executed an Amended and Restated Certificate of Limited Partnership ("Amended Partnership Certificate"), *see* PX 9, and an Amended and Restated Partnership Agreement ("Amended Partnership Agreement"), *see* PX 10, for Park South Associates. Both of these documents provide that all of the former partners in Park South Associates (both general and limited) are withdrawing from the limited partnership. In addition, the documents provide that Donald Trump is admitted as the general partner and Donald Trump and Barbizon Plaza Realty Corporation are admitted as limited partners.[3]

The sale of the partnership interests effectively transferred control over the Hotel from the previous general partner, Park South Corporation, to Donald Trump. Nonetheless, the formal ownership of the Hotel remained under the name of Park South Associates. According to the plaintiff, the transfer of the Hotel to Donald Trump was structured as a sale of the partnership interests rather than as an outright sale of the Hotel solely to avoid real estate transfer taxes and the possibility that a transfer of title would trigger an upward reassessment of the valuation of the Hotel for real estate tax purposes. *See* Transcript of Hearing ("Tr.") at 260-61; Plaintiff's Post-Trial Memorandum at 6.

For convenience, when referring solely to Park South Associates as it was constituted prior to the sale of the partnership interests, the Court will refer to the limited partnership as "Park South Associates I." Likewise, the Court will hereafter

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[3] Donald Trump transferred a 1% limited partnership interest to Barbizon Plaza Realty Corporation.

refer to the limited partnership after the sale as "Park South Associates II." Following the sale of the partnership interests, Park South Associates II agreed to recognize the Union as the collective bargaining agent of the Hotel employees, *see* DX N, and to continue to employ the Hotel employees.[4] In addition, Park South Associates II continue to contribute to the Fund on behalf of those employees.

As a consequence of the events described above, by letter dated December 1, 1981, the Fund demanded payments for withdrawal liability in the aggregate amount of $1,016,900 from Park South Corporation. By letter to the Fund dated February 5, 1982, Park South Corporation disputed that demand, asserting that the "purchase of the partnership interests was not an event triggering withdrawal liability under [MPPAA]." DX H. In support of its claim that no withdrawal had occurred, the letter explained that:

> The partnership interests in Park South Associates were purchased by Donald J. Trump on August 11, 1981. Prior thereto Park South Associates was the owner and operator of the Barbizon Plaza Hotel. It still is. Contributions continue to be made to the

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[4] This agreement between Park South Associates II and the Union was subsequently formally confirmed by an independent arbitrator's decision as follows:

> The new owners had, however, agreed to recognize the New York Hotel and Motel Trades Council as bargaining representative for the employees. It had also agreed to continue their seniority for purposes of layoffs, vacations, personal days, bereavement leave, jury duty absence, sick days, leaves of absence, severance pay, and other conditions of employment that are non-economic in nature. The new owners also agreed to give the employees credit for previous service for severance pay computations.
>
> At the joint request of the parties, I am setting forth and confirming these arrangements between them. This obviates any action by me on the Union's grievance.

See DX N at 2.

> Pension Plan for the same employees pursuant to a collective bargaining agreement with the same union.

Id.

Beginning on or about April 2, 1982, the plaintiff began making quarterly payments of the demanded withdrawal liability to the Fund under protest and reserved the right to dispute the application of MPPAA's withdrawal liability provisions to the facts of this case.

II. DISCUSSION

A multiemployer pension plan is a pension plan in which several employers in an industry pool their funds to provide pension protection for their employees. Prior to the enactment of MPPAA, employer withdrawals from those plans posed a significant threat to the stability of the plans. As explained to Congress by the Pension Benefits Guarantee Corporation ("PBGC"):[5]

> A key problem of ongoing multiemployer pension plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage – or – force – further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

See Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843, 848 (2d Cir. 1984) (quoting *Pension Plan Termination Insurance Issues: Hearing Before the Subcommittee*

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[5] The PBGC was created by Congress to oversee and provide insurance coverage to pension plans.

on Oversight of the Committee on Ways and Means, House of Representatives, 95th Cong., 2d Sess. 22 (1978)).

Congress responded to the problem of employer withdrawals by enacting MPPAA. *See generally Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1503-05 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 847-49 (2d Cir. 1984); *Peick v Pension Benefit Guaranty Corp.*, 539 F.Supp. 1025 (N.D.Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984).[6] Pursuant to MPPAA, if an employer withdraws from a multiemployer pension plan, that employer must pay certain sums to the plan to discharge its withdrawal liability. By requiring employers to pay these sums, Congress hoped to stem the "downward spiral" of continuing employer withdrawals. *See T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds, of Local 1730 Int'l Longshoremen's Assoc.*, 756 F.2d 939, 943-44 (2d Cir. 1985).

Briefly, the sums arising with respect to an employer's withdrawal liability are computed as follows. An employer's withdrawal liability is equal to that employer's proportionate share of the plan's unfunded vested benefits. The unfunded vested benefits are calculated as the difference between the present value of vested benefits and the current value of the plan's assets. *See* 29 U.S.C. §§ 1381, 1391; *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725, 104 S.Ct. 2709, 2715, 81 L.Ed.2d 601 (1984). The trustees of the plan have discretion to choose among various permissible actuarial methods in determining what a withdrawing employer's proportionate share of those unfunded vested benefits should be. *See Peick*, *supra*, 539 F.Supp. at 1034. For the purposes of this litigation, it

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[6] H.R.Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935 ("[t]he purpose [of imposing withdrawal liability] is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan").

is sufficient to note that an employer's past contribution history is taken into account in determining that proportionate share.[7]

Of course, an employer is not liable for withdrawal unless it withdraws from the Fund. Section 1383(a) of MPPAA defines a withdrawal as follows:

> A complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) permanently ceases to have an obligation under the plan, or
> (2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1383(a).

There are narrow exceptions to the above-stated definition set forth in MPPAA. First, there is the so-called change in business form exception, which provides:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

---

[7] As the district court in *Peick* explained, with a caveat that the explanation was a "gross oversimplification":

> Under the "presumptive" method of section 1391(b), the liability is determined basically by multiplying the plan's aggregate unfunded vested liabilities by a fraction whose numerator is the sum of all contributions required to have been made by the withdrawing employer during the previous five years. The denominator is the sum of all contributions made by all employers during this same period.

See Peick, *supra*, 539 F.Supp. at 1034 & n. 11. All parties to this action agree that an employer's prior contribution history is taken into account in determining the amount of withdrawal liability, if and when that employer withdraws from the plan.

> (1) an employer ceases to exist by reason of –
> (A) a change in corporate structure. . ., or
> (B) a change to an unincorporated form of business enterprise,
> if the change causes no interruption in employer contributions or *obligations to contribute the plan*. . . .

Id. § 1398 (emphasis added). For the purposes of section 1398, a change in corporate structure includes a change in identity, form, or place or organization, or a merger, consolidation, or division. *See* id. §§ 1398, 1362(d)(1) & (3).

Second, MPPAA also provides that a bona fide arm's length sale of assets to an unrelated party will not be considered a withdrawal provided that the purchaser and seller strictly comply with conditions set forth in MPPAA. *See* 29 U.S.C. § 1384(a); *New York State Teamsters Conference Pension & Retirement Fund v. St. Lawrence Transit-Mix Corp.*, 612 F.Supp. 1003, 1009 (N.D.N.Y. 1985). Specifically, for the sale of assets exception to apply, the purchaser must post a surety bond to insure payment of the full amount of withdrawal liability if and when the purchaser subsequently withdraws from the plan, the purchaser must have the same obligation to contribute to the plan as did the seller, and the seller must agree in the sale contract to remain secondarily liable for any withdrawal liability. *See* 29 U.S.C. § 1384(a)(1).

[1] The issue presented by this action is whether Park South Associates I and Park South Corporation are jointly and severally responsible for the withdrawal liability imposed by MPPAA.[6]

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[6] This Court has entertained extensive arguments from the parties with respect to whether the instant dispute must be arbitrated pursuant to 29 U.S.C. § 140(a). Although the plaintiff initially demanded arbitration, shortly thereafter the plaintiff switched its position and argued that arbitration was not required. The defendant then engaged in its own series of inconsistent arguments, at first vigorously arguing that arbitration was required and then just as vigorously maintaining that arbitration was unnecessary. The Court need not recount the long and protracted history of these disputes because, notwithstanding their

(footnote continued)

At the outset, the Court notes that if Park South Associates I is required to discharge its withdrawal liability to the Fund, then Park South Corporation, as the general partner, is of course liable for that debt as well. See N.Y. Partnership Law §§ 26, 98(1) (McKinney 1987). For the reasons set forth below, the Court concludes that Park South Associates I is subject to the withdrawal liability imposed by MPPAA.

[2] The plaintiff argues that Park South Associates I is not liable for withdrawal liability because it did not withdraw from the Fund within the meaning of § 1383(a). Significantly, the plaintiff does not rely on either the change of form or the sale of assets exception, and indeed, specifically concedes that Park South Associates I cannot find a safe harbor in any exception

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earlier inconsistent positions, both parties now agree that arbitration is not required.

The Court agrees with the parties' present position. It is well-settled that litigants need not resort to arbitration in an action brought pursuant to MPPAA if the resolution of the dispute turns solely on a question of statutory interpretation. *See T.I.M.E.-DC, Inc., supra*, 756 F.2d at 945; *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1210 (D.C. Cir. 1984). This action falls squarely within that exception because the material facts, i.e., that there was a sale of 100% of the partnership interests and that Mr. Trump did not assume any liabilities of the old partners, are undisputed.

Moreover, § 1401(a) only requires arbitration of factual disputes between an "employer" and the Fund. *See Banner Indus., Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 657 F.Supp. 875, 880 (N.D.Ill. 1987); *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 580 F.Supp. 1457, 1461-62 (S.D.N.Y. 1984); *Baldwin v. Shopmen's Ironworkers Pension Trust*, 3 Employee Benefits Cas. (BNA) 1713, 1716 (C.D. Cal. 1982). There is some question as to whether the plaintiff is an employer within the meaning of the statute and, as noted in note 2, *supra*, the Court held a hearing to resolve that question. At that hearing, all parties presently in the action agreed that the plaintiff was not the employer. *See* Tr. at 5. However, in its reply memorandum, the defendant has apparently altered its position and appears to be again claiming that the plaintiff is the employer. *See* Defendant's Post-Trial Reply Memorandum at 6. This ambiguity with respect to plaintiff's status as an employer affords further support for the non-arbitrability of the issues raised by this action. However, there is no need for the Court to definitively resolve the issue of plaintiff's employer status, since, as noted above, the issue of whether plaintiff is subject to withdrawal liability is one solely of statutory interpretation with respect to concededly undisputed facts.

set forth in MPPAA. *See* Post-Trial Memorandum of Plaintiff Park South Hotel Corp. ("Plaintiff's Memorandum") at 30.[9] Instead, the plaintiff argues Park South Associates I never withdrew because Park South Associates II is the same employer as Park South Associates I and has continued to employ the same employees and to contribute to the Fund on their behalf.

The defendant, on the other hand, argues that Park South Associates I and Park South Associates II cannot be considered the same employer for the purpose of determining whether a

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[9] Specifically, the plaintiff asserts that it cannot take advantage of 29 U.S.C. § 1398, the change in form exception, because "[o]f course, in the instant case there is not a change in structure." *See* Plaintiff's Memorandum at 30.

The plaintiff does not and cannot argue that the transfer of 100% of the partnership interests is covered by § 1398(1)(B), which excepts from the definition of a withdrawal "a change to an unincorporated form of business enterprise." The clear implication of this exception is that the exception only applies when a corporation changes to an unincorporated association. Since the partnership was concedely never incorporated in the first place, § 1398(1)(B), does not apply.

Although neither party has cited the case, the Court notes that at least one district court has interpreted § 1398(1)(B) to apply to a factual situation in which one partner in a two-party partnership is replaced with another partner. *See Connors v. B & W Coal Co.*, 646 F.Supp. 164 (D.D.C.1986). This case, which apparently interprets "a change *to* an unincorporated association" to include a change *in* an unincorporated association, appears to be at odds with the plain language of the statute.

In any event, the *Connors* case is clearly distinguishable from the instant action. Section 1398(1)(B) will only apply if the new partnership not only continues contributing to the Fund, but also assumes the old partnership's obligation to contribute. *See* 29 U.S.C. § 1398. In *Connors*, the agreement transferring the partnership interests "clearly transferred. . .all of the benefits and obligations of the predecessor" partnership. *See Connors, supra*, 646 F.Supp. at 169. In the instant case, however, the purchase agreement did not transfer any obligations of Park South Associates I to the partners of Park South Associates II and, indeed, the agreement specifically provided that Trump would not assume any liabilities of the old partners. In view of that circumstance, even assuming *arguendo* that § 1398(1)(B) could apply to a 100% change in a partnership's membership, that section would still be inapplicable. *Compare Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897, 901 (3d Cir. 1986).

withdrawal has occurred. According to the defendant, Park South Associates I permanently ceased covered operations and permanently ceased to have an obligation to contribute to the Fund following the transfer of the partnership interests.[10]

[3] The Court agrees with the defendants. It would exalt form over substance, and would clearly be inconsistent with the broad remedial purposes of MPPAA, to find no change in employer status where, as here, there are no common partners between the two partnerships, where the new partners have expressly disavowed any obligations of the old partners, and, indeed,where the only thing the two partnerships have in common is the partnership name. It simply defies common sense to say that Park South Associates II, a partnership made up of Donald Trump and the Barbizon Realty Corporation, is the same employer as Park South Associates I, a partnership made up of Park South Corporation and several independent limited partners.

While it is true that Park South Associates II subsequently agreed to employ the Hotel employees and to contribute to the Fund on their behalf, MPPAA is concerned with much more than merely insuring continuing present contributions for one employer's employees. *See Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking*, 788 F.2d 428, 432 (7th Cir. 1986). Rather, the withdrawal liability provisions of MPPAA seek to protect the stability of *all* participating employees by requiring an employer to pay, upon withdrawal, its proportionate share of the unfunded vested benefits.

In the instant case, according to the unambiguous terms of the purchase agreement, the purchasing partners did not assume

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[10] The defendant also argues that a letter sent by the plaintiff to the Union just prior to the closing of the Purchase Agreement, which purported to discharge all of the Hotel Employees, *see* DX B, in and of itself establishes a withdrawal. The Court does not agree. While that letter may be relevant to the issue of whether there has been a *permanent* cessation of covered operations as the statute requires, it is not and cannot be dispositive, especially where, as here no employees actually left their jobs, and here was no de facto interruption of their employment activity.

any of the selling partners liabilities, including their liability for the former partnership's contribution history up to that point. As a consequence, when and if Park South Associates II withdraws from the Fund at a later time, Park South Associates II's withdrawal liability will not be calculated with reference to the old partnership's contribution history. Thus, if withdrawal liability is not imposed upon Park South Associates I at this time, the burden of funding Park South Associates I's proportionate share of the unfunded liabilities will fall on the remaining contributing employers in the Fund. As noted by the PBGC in an opinion letter dealing with a similar factual scenario, "[t]his is precisely the result Congress sought to avoid with the passage of the Multiemployer Act." *See* PBGC Opinion Letter 82-040 at 2 (December 27, 1982) (annexed as exhibit 2 to Defendant's and Additional Counterclaim Plaintiffs' Post-Trial Memorandum).[11]

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[11] In that opinion letter, the PBGC counsel considered the question of whether a selling employer is shielded from withdrawal liability when it sells its assets to a purchaser who takes over the seller's name, plant, employees, and inventory. It was conceded, as in the instant case, that none of the requirements set forth in the sale of assets exception were met. The PBGC counsel concluded that withdrawal liability would be imposed on the selling employer in that case. According to the opinion letter:

> "In this situation, Congress intended the seller to pay his allocated share of the plan's unfunded vested benefits, i.e., that share which was accrued during his participation in the plan. The purchaser has no obligation fo this past liability and is treated to a new employer contributing to the plan with respect to the transferred operations. Thus, unless the seller is considered to have withdrawn from the plan, the seller's share of the plan's unfunded vested benefits would fall on the remainder of the contributing employers. That is precisely the result Congress sought to avoid with the passage of the Multiemployer Act.

See PBGC Opinion letter 82-040 at 2 (December 27, 1982). The facts of this action are even more compelling with respect to the imposition of withdrawal liability than those set forth in the opinion letter because here the purchasing partner *specifically* declined to assume any of the selling partners' liabilities.

Moreover, if the plaintiff were to succeed in its characterization of Park South Associates II as the same employer as Park South Associates I, then any partnership wishing to sell its assets could easily avoid the stringent requirements set forth in the sale of assets exception by simply transferring the partnership interests rather than selling its assets outright. As noted above, for the sale of assets exception to apply, the purchaser must post a surety bond to insure payment of the full amount of withdrawal liability if and when the purchaser subsequently withdraws from the plan, the purchaser must have the same obligation to contribute to the plan as did the seller, and the seller must agree in the sale contract to remain secondarily liable for any withdrawal liability. *See* 29 U.S.C. § 1384(a)(1); *cf. New York State Teamsters, supra*, 612 F.Supp. at 1009. Concededly, none of these requirements were met in this case. Indeed, rather than posting a bond to insure that the full amount of withdrawal liability would be paid if and when Park South Associates II withdrew from the Fund, Mr. Trump specifically declined to assume any liabilities of the partners in Park South Associates I, thereby insuring that the full amount of withdrawal liability would *not* be paid following a subsequent withdrawal. Because the Court cannot ascribe to Congress the intent to permit the statutory requirements in the sale of assets exception to be so easily circumvented, the Court must conclude that Park South Associates I withdrew from the Fund.

Indeed, the plaintiff concedes that even though Park South Associates II is not liable for the former partnership's contribution history, then withdrawal liability must be imposed or the "purpose of the statute would be defeated." *See* Plaintiff's Reply Memorandum at 4. However, the plaintiff argues that under New York partnership law, Park South Associates II is the same partnership as Park South Associates I because the parties to the sale of the partnership interests specifically agreed to continue the partnership, and that therefore, Park South Associates II will be liable for Park South Associates I's debts, including its contribution history, regardless of any specific agreement to the contrary in the purchase agreement. Thus, plaintiff concludes that the facts of this case are analogous to the corporate

merger and sale of assets exceptions and, therefore, no withdrawal liability should be found. *See* Plaintiff's Memorandum at 30-31. These arguments lack merit and must be rejected.

First, the Court notes that the issue of whether there has been a withdrawal under MPPAA is a federal question that cannot be determined by reference to the differing partnership laws of the states. In enacting MPPAA, Congress set up a comprehensive and detailed scheme to deal with a perceived problem which was national in scope. Therefore, Congress could not have intended that the question of whether withdrawal liability has been incurred should turn on state law. Instead, the Court must look to federal law and the federal policy considerations underlying MPPAA to resolve that issue. *Cf. Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F.Supp. 630, 633 (S.D.N.Y. 1986).

A proper analysis of these considerations leads inevitably to the conclusion that, even assuming *arguendo* that Park South Associates II is liable for Park South Associates I's debts under New York law, the Court must still find withdrawal liability. Congress enacted a carefully drawn and reasonably restrictive scheme of situations in which withdrawal liability could be avoided. In the sale of assets exception, Congress specifically required the purchasing company to post a surety bond. In the change in form exception, Congress required that the resulting entity specifically assume the old corporation's obligation to contribute to the Fund. Congress could have created a further exception to withdrawal liability where liability for the former employer's contribution history is imposed as a matter of state law, but chose not to do. In the face of that statutory scheme, the Court is not free to judicially create a new exception to the scheme arising out of the fortuitous circumstance that the laws of one state, on the unique facts of this action, may impose upon the new employer a liability for the old employer's contribution history. This is especially true since Congress expressly provided exceptions for a corporate merger and for a sale of assets but did not provide an exception for a transfer of 100% of a partnership's interests. *See Central States, supra*, 788 F.2d at 433.

Moreover, the Court is not convinced that a New York court would, as plaintiff argues, consider Park South Associates II to be the same partnership as Park South Associates I and, therefore, hold Park South Associates II liable for the contribution history of Park South Associates I. the plaintiff has not cited any New York statute or case law supporting the highly questionable proposition that a limited partnership does not dissolve, where, as here, all of the general and limited partners simultaneously withdraw from the partnership and the new partners and old partners expressly agree that the new partners will not be liable for any of the old partners' debts. To the contrary, the general rule is that the withdrawal of a single general partner causes a dissolution of the partnership. *See* N.Y. Partnership Law §§ 60, 98 (McKinney 1987); *Vann v. Kreindler, Relkin & Goldberg*, 78 A.D.2d 255, 258, 434 N.Y.S.2d 365, 368 (1st Dept. 1980), *aff'd*, 54 N.Y.2d 936, 429 N.E.2d 817, 445 N.Y.S.2d 139 (1981); *C.E. Hooper, Inc. v. Perlburg, Monness, Williams & Sidel*, 72 A.D.2d 687, 688, 421 N.Y.S.2d 353, 354 (1st Dept. 1979), *appeal dismissed*, 49 N.Y.2d 736, 402 N.E.2d 1169, 426 N.Y.S.2d 268 (1980).[12]

Moreover, the factual underpinnings of plaintiff's argument, *i.e.*, that the purchasing and selling partners specifically agreed

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[12] Section 109 of the New York Partnership Law, relied upon heavily by the plaintiff, is not applicable to this case. This section provides:

> The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the *remaining* general partners.
>
> (a) under a right to do so stated in the certificate, or,
>
> (b) with the consent of all the members.

N.Y. Partnership Law § 109 (McKinney 1987) (emphasis added).

Here the business was not continued by the remaining general partners for the simple reason that there were no "remaining" general partners following the sale of 100% of the partnership interests.

that the partnership would continue, is dubious at best. Plaintiff has not come forward with any such specific agreement to continue the partnership but instead rules merely on the fact that the purchasing and selling partners characterized the new partnership agreement and certificate for Park South Associates II as "Amended." *See* PX 9; PX 10. While that characterization might arguably permit an inference that the parties intended to continue the partnership, it does not rise to the level of establishing the specific agreement to continue the partnership which plaintiff claims exists. Given the clear and unambiguous terms of both the Purchase Agreement and the selling partners' affidavits, which expressly stated that the purchasing partners were not liable for any debts of the withdrawing partners, and the fact that the partnership continued in name only, it is difficult to believe that a New York court would shift to Park South Associates II the burden of assuming the old partnership's debts, merely because, as a matter of form the parties to the sale executed an Amended Partnership Agreement rather than formally executing a new partnership certificate and agreement for Park South Associates II.[13]

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[13] The plaintiff also argues that because the parties to the sale structured the deal as a transfer of the partnership interests rather than as a sale of assets, concededly solely for the purposes of avoiding real estate taxes, those parties specifically intended that the partnership would be the same entity. This intent that plaintiff attributes to the parties, however, is belied by the selling partners' affidavits executed at the time of the sale. These affidavits indicate that the parties were in no way concerned with whether the two partnerships were considered the same entity, and indeed, anticipated that Park South Associates I might dissolve as a result of the sale. Instead, as those affidavits indicate, the parties were only concerned that the new partners would not be liable for any of the old partners' frustrate. Moreover, the selling partners' affidavits stated that Park South Associates I is a "wholly existing New York limited partnership which has not been terminated by operation of law, except as same may be terminated by virtue of said Assignment of Partnership Interests." This constitutes further evidence that the parties, rather than specifically intending the partnership to continue, contemplated that the sale of the partnership interest would and could effect the termination of the partnership. *See* DX J at ¶3l; *see also* DX G.

III. CONCLUSION

For all of the aforementioned reasons, plaintiff's request for a declaratory judgment is denied. The request of defendant and the additional plaintiffs on the counterclaim for a declaratory judgment is granted as follows:

> Park South Corporation and Park South Associates I are jointly and severally liable to the Fund for withdrawal liability pursuant to 29 U.S.C. § 1381.

Judgment shall be entered accordingly.

It is SO ORDERED.

No. 88-522

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. PENSION FUND and VITO J. PITTA AND ALBERT A. FORMICOLA, as Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund,
Petitioners,

v.

PARK SOUTH HOTEL CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

If a change in the identity of a partnership's partners does not cause the partnership to cease paying contributions to a multiemployer pension plan or to cease having an obligation to pay such contributions or to cease operations covered by such plan, may the plan nevertheless assert that the partnership has withdrawn from the plan and collect withdrawal liability from the partnership's former general partner?

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STATEMENT OF THE CASE

The Petition for a Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Second Circuit in *Park South Hotel Corp.* v. *New York Hotel Trades Council,* 851 F.2d 578 (2d Cir. 1988). This brief is submitted in opposition to that Petition.

Respondent Park South Hotel Corp.[1] ("Hotel Corp.") was, until August 11, 1981, the general partner of Park South Associates, a limited partnership which owned the Barbizon Plaza Hotel in New York City. On August 11, 1981, Hotel Corp. and the limited partners of Park South Associates sold their interests in the partnership. The buying and selling partners all executed an Amended and Restated Certificate of Limited Partnership admitting the new partners as general and limited partners of Park South Associates. 851 F.2d at 580.

Both before and after the 1981 transfer of interests in the partnership, Park South Associates paid contributions to the petitioner New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund (the "Fund"), a multiemployer pension plan, on behalf of its employees pursuant to a collective bargaining agreement. Park South Associates continued to own the hotel and continued its membership in the employer association whose collective bargaining agreement with a union required contributions to the Fund. *Id.* at 580-81.

Despite this continuity of the contribution relationship between the Fund and Park South Associates, the Fund demanded that Hotel Corp., as the partnership's former general partner, pay withdrawal liability to the Fund pursuant to Part 1 of Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, as amended by Title I of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 29 U.S.C. §§ 1381-1405 (1982). The Fund claimed that the sale of the partnership interests in Park South Associates

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[1] Park South Hotel Corp. has no affiliates, parents or subsidiaries within the meaning of Rule 28.1 of the Rules of this Court.

meant that the partnership had withdrawn from the Fund. Hotel Corp. protested the claim, contending that the continuity of Park South Associates as the owner and operator of the hotel and contributor to the Fund meant that no withdrawal had taken place. Nevertheless, the Fund persisted in its view. Required by law to make quarterly installments in excess of $32,000 each in payment of the claimed withdrawal liability totaling $1,000,000 in order to avoid acceleration of the full amount of the claim, Hotel Corp. began making the quarterly payments under protest and commenced this action. *Id.* at 581.

Hotel Corp. sought a declaratory judgment that the August 1981 transfer of partnership interests did not trigger an obligation to pay withdrawal liability under ERISA. While cross-motions for summary judgment were pending, the Fund filed counterclaims against both Hotel Corp. and Park South Associates, as additional counterclaim defendant. The counterclaims sought a declaratory judgment allocating between Hotel Corp. and Park South Associates such withdrawal liability to the Fund as may arise out of a future withdrawal by Park South Associates in the event that the District Court agreed with Hotel Corp. that the 1981 transfer of partnership interests was not a withdrawal. Counterclaims and crossclaims were interposed as a result of this procedural maneuver. The District Court conducted an evidentiary hearing on the cross-motions for summary judgment on March 13 and 14, 1984. Shortly after the hearing, but before the District Court's decision, the Fund and Park South Associates agreed to dismiss the Fund's counterclaim against the partnership concerning the hypothetical future withdrawal. The District Court dismissed the counterclaim without prejudice.

On October 30, 1987, the District Court issued its Opinion and Order, reported at 671 F. Supp. 1000. The District Court held that the partnership had permanently ceased covered operations under the Fund and permanently ceased to have an obligation to the Fund as a result of the transfer of the partnership interests. The District Court relied upon the particulars of the agreements

executed at the 1981 closing allocating among the former partners and the new partners various liabilities arising before, at and after the closing.

The Court of Appeals unanimously reversed. Finding that Park South Associates, the partnership, owned the hotel, contributed to the Fund and continued to do so after the transfer of partnership interests, the Court of Appeals determined that the partnership, and not its general partner, was contributing employer. The Court of Appeals further found that the change in partners did not cause the partnership to terminate. Accordingly, the Court of Appeals found that because the partnership continued its covered operations under the Fund and continued to have an obligation to contribute to the Fund, there was no withdrawal from the Fund as a result of the change in partners. 851 F.2d at 582-3.

The Court of Appeals rejected the Fund's claim that the terms of the sales agreement required a finding that a withdrawal had occurred. The Court found that the agreement between the old partners and the new as to their respective liabilities for obligations to third persons "does not affect the liability of the partnership to the Fund, which federal law created and the determination of which federal law governs. The parties cannot by agreement change or eliminate any liability that federal law imposes upon the partnership." *Id.* at 583.

The Court of Appeals observed that ERISA Section 4218, 29 U.S.C. § 1398 (1982), demonstrates "that Congress did not intend to treat, as an employer withdrawal from a plan, mere changes in the form or structure of an employer that do not alter the employer's basic relation with, participation in, or obligation to, the plan or change the nature of the employer's operations." *Id.* at 583-4. Had the hotel's owner been a corporation and the August 1981 transaction constituted a sale of stock, there would have been no withdrawal by operation of § 1398.

Finally, the Court rejected the Fund's argument that imposing withdrawal liability in this case was necessary to advance the

Congressional purpose underlying the concept of withdrawal liability. The Court again pointed out that the partnership continued to contribute to the Fund and to be liable to the Fund for those contributions and concluded:

> In these circumstances the sale of the partnership interests did not create the problems for the Fund that Congress sought to ameliorate by imposing withdrawal liability.

Id. at 584.

SUMMARY OF ARGUMENT

This case raises no issue of general importance sufficient to merit review by this Court. Determination of the withdrawal liability implications of the change in the identity of the partners in Park South Associates turns upon an analysis of the particular operational arrangements at the hotel before and after the transaction. The Fund does not challenge the analysis by the Court of Appeals of those arrangements or the conclusion that the partnership continued to operate the hotel and to contribute to the Fund without interruption after the substitution of partners. Instead, the Fund argues that the details of the purchase agreement and other documents executed when the partnership interests were sold, and the New York Partnership Law implications of the transaction, have the effect of creating a fictitious interruption in contributions constituting a withdrawal from the Fund.

The argument is not only wrong, but it is so narrow and particularized that its consideration by this Court would provide no guidance to anyone other than the parties herein. Moreover, the record shows that the transaction was negotiated in early 1981, when withdrawal liability was a new concept. Now, more than eight years after withdrawal liability has been a fact of life, it is extremely unlikely that a major transaction such as this would be negotiated without reference to its withdrawal liability implications.

The decision below does not conflict with the decision of any other court. The decision by the United States Court of Appeals

for the Seventh Circuit cited by Petitioner involves an entirely different set of facts. There, it was undisputed that the employer had withdrawn from the multiemployer pension plan; here, withdrawal is the issue in dispute. Notwithstanding this distinction, the decision below in fact adheres to the logic of the Seventh Circuit's opinion. The narrow issue of the withdrawal liability implications of changes in the identity of a partnership's partners has not been addressed by any courts other than in the decision below and a decision in the District of Columbia District, both of which reach the same result.

Finally, the decision below does not threaten to undermine successful accomplishment of the Congressional purpose behind the enactment of ERISA's withdrawal liability provisions. The transaction at issue did not cause the number of contributing employers to diminish and neither caused nor threatened to cause a drop in the number of covered participants or in the amount of incoming contributions. Protecting multiemployer pension plans against the loss of contributing employers does not require imposing withdrawal liability upon a transaction which causes no such loss. The specter of employers scheming to evade withdrawal liability through baroquely devised transactions may be remedied by invocation of ERISA's anti-sham provision. The distortion of the statutory scheme which underlies the Fund's position is no way to accomplish that result.

In short, this case hardly merits discretionary review. *See Rockford Life Insurance Co.* v. *Illinois Department of Revenue*, ___ U.S. ___, ___ n.3, 107 S. Ct. 2312, 2314 n.3 (1987).

ARGUMENT

I

THE PETITION PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW MERITING REVIEW BY THIS COURT

There are no "special and important reasons" within the meaning of Rule 17 of the Rules of this Court for granting review of the decision of the Court of Appeals in this case.

A. The Issues Raised by the Petition Concern Interpretation of Various Agreements and New York Partnership Law.

The Court of Appeals decided that the transfer of partnership interests did not cause the partnership to cease having an obligation to contribute to the Fund or to cease its covered operations under the Fund. The Court found that the partnership's continuing ownership of the hotel, relationship with the union, employment of the hotel's employees and, most importantly, its continuing payment of contributions to the Fund support this conclusion. Of course, cessation of either the contribution obligation or the covered operation is the essential element of a withdrawal. ERISA Section 4203, 29 U.S.C. § 1383 (1982). The Fund does not, and cannot, quarrel with these facts or their inevitable consequences under the relevant statutes.[2]

The Fund focuses upon, and misconstrues, the particulars of the documents which effected the transfer of the partnership interests. Unraveling the Fund's contorted construction of the documents hardly constitutes the kind of compelling federal question which would justify invocation of this Court's power of review on certiorari.

The purchase agreement for the transfer of the partnership interests contained language of indemnity by which the selling general partner, Hotel Corp., relieved the purchasing partners

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[2] The Fund has always based its claim against Hotel Corp. upon the asserted withdrawal of Park South Associates when the partnership interests were transferred and Hotel Corp.'s liability as general partner for the partnership debts. Hotel Corp. had no relation to the Fund other than as a general partner of the limited partnership, Park South Associates. That relationship arose under state partnership law, not a collective bargaining agreement or labor-management relations law, and therefore did not give rise to an "obligation to contribute" within the meaning of ERISA Section 4212 (a), 29 U.S.C. §1392 (a) (1982). Since the partnership owned the hotel, employed the employees and contributed to the Fund, Hotel Corp. itself had no operations under the Fund. Accordingly, Hotel Corp. did not withdraw from the Fund within the meaning of 29 U.S.C. § 1383, since it had no obligation to contribute or covered operations which ceased when it left the partnership.

from liability for obligations "between or among [the former partners] or for any obligation of the [former partners] or any them to a third party." Appendix, *Park South Hotel Corp.* v. *New York Hotel Trades Council, supra,* Docket No. 87-9025 at 366-67 (hereinafter "2d Cir. App."). Indemnification agreements are simply a means of completely shifting a liability from one party to another. They do not themselves create a liability to be shifted. In context of the transaction at issue, the indemnification agreements protect the new partners from lurking preexisting debts or obligations of the old partners and were incorporated into the purchase documents with the purpose, as stated therein, of inducing the purchasing partners to purchase the partnership interests. Withdrawal liability is not a debt that arises before withdrawal merely because it is calculated upon the basis of pre-withdrawal contributions and unfunded vested liabilities. *Teamsters Pension Trust Fund of Philadelphia* v. *Central Michigan Trucking, Inc.*, No. 87-2023 (6th Cir. Sept. 28, 1988), 1988 U.S. App. Lexis 13013. To argue that the indemnification agreements in fact created a withdrawal liability is circular and wholly unpersuasive.

Even if this Court were inclined to delve into the details of this transaction as the Fund requests, the fact remains that withdrawal liability arises out of the objective facts of relations between an employer and a pension fund. Congress has decreed that only a sale of assets transaction may be deliberately structured on paper by the parties to affect the question of whether withdrawal liability accrues as result of the transaction. *See,* ERISA Section 4204, 29 U.S.C. § 1384. The instant transaction, however, was not a sale of assets but, rather, a transfer of interests in a limited partnership. Hotel Corp. has never contended that § 1384 has any relevance to this case.

In asking the Court to hold that the provisions of the purchase agreement are dispositive of the question of withdrawal liability, the Fund proposes that purchasers and sellers of partnership interests be given a totally free hand to make any kind of deal they want in order to manipulate withdrawal liability. The

suggestion invites determination of withdrawal liability issues without regard to whether there has been a withdrawal in the statutory sense enacted by Congress—actual cessation of either the contribution obligation or plan-covered operations. Such a result would be inconsistent with the law and detrimental to the policy it embodies since it would leave multiemployer plans at the mercy of creative fashioners of business transactions.

The Fund also argues that the the transfer of partnership interests constituted a withdrawal from the Fund by referring to New York Partnership Law, claiming that the decision of the Court of Appeals construing the New York Partnership Law implications of the change in partners was "clearly erroneous." (Cert. Petition at 14.) Again, the Fund fails to present an issue worthy of review by this Court.

In the first place, this Court does not usually sit to correct erroneous interpretations of state law.[3] Second, the Court of Appeals reached a correct result under state law. The original partnership agreement creating Park South Associates permitted the general partner and the limited partners to transfer their interests. 2d Cir. App. at 875. New York Partnership Law permits a limited partnership to continue nonwithstanding a change in the identity of its partners. *Kanarek* v. *Gadflex Assoc.*, 115 A.D. 2d 592, 496 N.Y.S.2d 253 (2d Dept. 1985), *app. denied*, 67 N.Y.2d 602 (1986). *See* N.Y. Partnership Law §§ 53(1), 98 and 108 (McKinney 1988). Dissolution of a partnership does not cause its termination. N.Y. Partnership Law § 61 (McKinney 1988). *See also Neuberger, Loeb & Co.* v. *Gross*, 611 F.2d 423, 427 (2d Cir. 1979).

B. Consideration of the Issues Decided by the Court of Appeals Will Not Contribute to Settling an Important Legal Issue of General Concern.

First, as stated above, resolution of this action depends upon the specifics of the 1981 transaction and its aftermath at the hotel.

---

[3] Conflict between a decision of a Court of Appeals and state law was eliminated in 1980 from the enumeration of grounds for granting a writ of certiorari appearing in Former Rule 19.

The withdrawal liability implications of those particulars will give little guidance to participants in other business transactions.

Second, the circumstances giving rise to this action are unlikely to recur. The negotiations leading up to the transfer of partnership interests began early in 1981, only four months after Congress enacted ERISA's withdrawal liability provisions. In fact, the law was so new that the question of withdrawal liability never came up during any of the negotiations leading to the transfer. Now withdrawal liability has been a fact of commercial life for more than eight years, and business transactions routinely comprehend the withdrawal liability implications. The paucity of reported cases on the subject of partnerships and withdrawal liability demonstrates the absence of a need for this Court's intervention on the subject.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH EITHER THE HOLDING OR THE LOGIC OF ANY OTHER DECISION

A. The Seventh Circuit Has Not Issued A Conflicting Ruling.

The Fund's selection of *Central States, Southeast and Southwest Areas Pension Fund* v. *Belmont Trucking Co., Inc.*, 788 F.2d 428 (7th Cir. 1986), as the decision conflicting with the decision below in this action demonstrates a thorough misunderstanding of the issue before the Seventh Circuit in that case. In *Central States* the employer acknowledged that it stopped paying contributions to the multiemployer plan and argued only that withdrawal liability should not be assessed because its employees had been hired by other contributing employers. The employer relied upon the continuing relationship between its *employees* and the Fund to argue that it did not owe any withdrawal liability. The Seventh Circuit's rejection of this argument has no bearing on

this case,[4] which turns upon the continuing relationship between the Fund and the *employer*, Park South Associates. In *Central States*, the fact of withdrawal was undisputed and the Seventh Circuit never discussed it; in the present case, the threshold question of whether a withdrawal occurred in the *only* issue.

The rationale of the Seventh Circuit Court of Appeals in *Central States* actually supports Hotel Corp.'s position in this case.[5] The court in *Central States* observed that the policy underlying withdrawal liability includes the need to compensate a muliemployer pension plan for the shrinkage of the plan which results when the number of employers decreases. There is a presumptive loss of jobs when an employer goes out of business as did the employer in *Central States*. The court went on to say:

> But this presumption should not attach merely because a covered enterprise changes its name, its *ownership* or its structure while its operations are carried on generally intact . . . .

788 F.2d at 433 (emphasis added). Of course, that is precisely what happened in the present case. The change in the partnership's owners did not cause any diminution in the number of employers contributing to the Fund and posed no threat of any loss of jobs. Thus, the decision of the Court of Appeals herein simply cannot be said to create a conflict within the federal judiciary requiring resolution by this Court.

---

[4] The Fund cited the *Central States* decision only in passing in its brief to the Court of Appeals and did not argue that a decision in favor of Hotel Corp. would conflict with the decision in *Central States*. *See* Brief for Appellee at 49, *Park South Hotel Corp.* v. *New York Hotel Trades Council, supra*, Docket No. 87-9025.

[5] The same may be said of the recent decision by the Sixth Circuit in *Teamster Pension Trust Fund of Philadelphia, supra*, 1988 U.S. App. LEXIS 13013, holding that a parent company which spins off a subsidiary has no contingent withdrawal liability which becomes due should the spun-off company subsequently withdraw.

B. The Decision Below is Consistent with the Only Other Relevant Precedent.

The only other reported decision concerning partnerships and withdrawal liability reached the same conclusion as did the Court of Appeals herein. In *Connors* v. *B&W Coal Co., Inc.*, 646 F. Supp. 164 (D.D.C. 1986), the employer, a partnership, argued that withdrawal from a multiemployer plan took place before MPPAA's effective date. The claimed withdrawal was said to have occurred when one of the two partners sold his interest in the partnership. The Court rejected the argument, relying upon ERISA Section 4218, 29 U.S.C. § 1398, which provides in relevant part:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because —
>
> (1) an employer ceases to exist by reason of —
>
> (A) a change in corporate structure described in section 1362 (d) of this title, or
>
> (B) a change to an unincorporated form of business enterprise,
>
> if the change causes no interruption in employer contributions or obligations to contribute under plan . . . .

The Court rejected the notion that Section 1398 exempted from withdrawal liability only those changes in business form which corporations, as opposed to partnerships or sole proprietorships, undergo:

> [S]ection 4218(1) (b) [29 U.S.C., Section 1398 (1) (B)] explicitly applies whenever an "employer" ceases to exist because of a "change to an unincorporated form of business enterprise." It does not state, as defendant would have it, that the section applies only when there is a change from a corporate to an unincorporated enterprise. Indeed, an "employer" is defined by ERISA to include not only

> corporations, but also individuals, partnerships, and unincorporated associations. 29 U.S.C. § 1002(5), (9). Second, by substituting the word "corporation" for "employer," defendants would exempt reorganizations of partnerships from section 4218, a result totally inconsistent with its purposes.

Connors at 168. Thus, the Court in *Connors* held that Section 1398 carves out from the ambit of the Act's definition of "permanent cessation" the situation in which an "employer," be it a corporation, individual, partnership or unincorporated association, undergoes a "change to an unincorporated form of business." As a result, the transfer of the partnership interest did not constitute a withdrawal from the plan.

The Court of Appeals herein reached the identical conclusion with respect to the transfer of the interests in Park South Associates. While the Court of Appeals used slightly different reasoning with respect to Section 1398, the most that can be said is that the difference may "present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice* v. *Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 74 (1955). *Connors* and the decision below herein both hold that a change in a partnership's partners does not trigger withdrawal liability if the partnership's operations and contributions to the plan survive the change. [6] There is no decision to the contrary.

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[6] The Court of Appeals correctly concluded that Section 1398 does not bear directly on this case. Like any exemption, Section 1398 presumes that a withdrawal has occurred; otherwise no exemption would be necessary. Section 1398 applies when a withdrawal occurs because an employer "ceases to exist." Park South Associates never ceased to exist and did not otherwise withdraw from the Fund. The significance of Section 1398 lies in its articulation of the principle that mere changes in business form that do not disrupt contribution obligations should not trigger withdrawal liability. The decision of the Court of Appeals is consistent with that principle.

III.

THE DECISION OF THE COURT OF APPEALS DOES NOT JEOPARDIZE ANY POLICY INTEREST EMBODIED IN ERISA'S WITHDRAWAL LIABILITY PROVISIONS

The Fund argues that review and reversal of the decision by the Court of Appeals is necessary to alleviate a supposed threat to the contribution bases of multiemployer pension plans. The suggested threat is entirely illusory.

An inability to impose withdrawal liability upon a transaction when the employer continues to contribute to the plan after the transaction at issue does not deprive the Fund of any protection Congress intended to provide. By definition, there is no downward spiral in the number of contributing employers or participating employees in such a circumstance, and there is no loss in future contributions for which the Fund and its contributing employers require compensation in the form of withdrawal liability.

The decision below certainly does not imperil the Fund with respect to this particular set of facts. The change in partners cannot be said to have jeopardized the Fund's ability to collect future contributions or future withdrawal liability since the new general partner is Donald Trump. The risk that a court adjudicating a claim for withdrawal liability arising out of a real future withdrawal might disagree with the Court of Appeals, leaving the Fund with nothing, is extremely remote. It could have been avoided entirely had the Fund not agreed to discontinue the counterclaims, which were interposed to eliminate that very possibility.

The decision below likewise does not create extrastatutory opportunities to evade the obligation to pay withdrawal liability. The Fund's argument in this regard assumes that Section 1384, the sale of asset provision, prescribes the *only* manner in which a business may be sold without incurring withdrawal liability. The

assumption lacks validity because it ignores the plain fact that certain transactions, like the change in partners involved in the present case, do not create a withdrawal at all. When a contributing employer sells its assets and thereby ceases to have an obligation to contribute to the plan, it has withdrawn and withdrawal liability will be attached absent the statutory exemption embodied in Section 1384. When there is no withdrawal to begin with, there is no need to invoke any statutory exemption since withdrawal liability may not be imposed absent a withdrawal.

The Fund's observation that no statutory exemption expressly bars imposition of withdrawal liability when partnership interests are sold is beside the point. When, as in the present case, there is no withdrawal an exemption is not needed to defeat the Fund's claim. The Fund is asking this Court to amend ERISA by adding a provision commencing, "Notwithstanding the absence of a withdrawal, a plan may collect withdrawal liability when the following occurs...." The provision would then presumably catalog the various kinds of deals from which the Fund would collect a windfall of the type it attempted to claim from Hotel Corp. Congress, rather than this Court, is the proper venue for such a plea, where it would undoubtedly be rejected as well since Congress did not intend to provide a windfall to multiemployer plans when it created withdrawal liability.

The Fund raises the specter of employers rushing to structure transactions as partnership transfers in order to evade the duty to pay withdrawal liability without complying with the bonding and other requirements in Section 1384. First, the Fund makes no such allegation against Hotel Corp., and it has never relied upon ERISA's anti-sham provision discussed immediately *infra*. Second, the decision below offers no "escape hatch" except in situations like the one in this case in which withdrawal liability should not be imposed to begin with. Moreover, Congress foresaw the evasion problem and provided a remedy by enacting an anti-sham provision as part of MPPAA, ERISA Section 4212(c), 29 U.S.C.§ 1392(c) (1982), which provides:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Congress having adequately protected multiemployer plans from evasion, judicial revision of the concept of "withdrawal" to accomplish that purpose is unnecessary, as well as jurisprudentially unwarranted. "There is no congressional mandate to engage in legal gymnastics in order to guarantee pension plans at all costs . . . or to apply the statute in a nonsensical fashion in order to assure full payment of withdrawal liability." *Teamsters Pension Trust Fund of Philadelphia, supra,* 1988 U.S. App. Lexis 13013 at 5.

Finally, the Fund complains that the Court of Appeals has contravened an alleged policy which is said to encourage changes in business form which cause the number of "responsible parties" to increase while discouraging those changes which cause a decrease in their number. The Fund cites no legislative history announcing this so-called policy and there is no reason to believe that Congress enacted MPPAA with that idea in mind. More significantly, there is nothing inherent in either incorporating or unincorporating, selling stock or selling partnership interests, to justify a presumption that any one necessarily increases or decreases the number of "responsible parties" more than any other. Either a transfer of partnership interests or incorporation of a partnership can cause an enterprise to become part of a group of trades or business under "common control", 29 U.S.C. § 1301 (b)(1), or to leave such a group. It all depends on the particulars of the individual transaction. The "policy" which the Fund professes to have found either does not exist, or has nothing to do with whether businesses function as partnerships or corporations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Park South Hotel Corp.

Dated: New York, New York
October 26, 1988

APPENDIX

29 U.S.C. § 1301. Definitions

* * *

(b) (1) . . . . For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or business (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

29 U.S.C. § 1383. Complete withdrawal

(a) *Determinative factors*

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer-

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1392. Obligation to contribute

(a) *Definition*

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty arising under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

* * *

(c) *Transactions to evade or avoid liability*

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1398. Withdrawal not occur because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because -

(1) an employer ceases to exist by reason of -

(A) a change in corporate structure described in section 1362 (d) of this title, or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan. . . .

N. Y. Partnership law § 53. Assignment of partner's interest

1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management of administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

N.Y. Partnership Law § 61. Partnership not terminated by dissolution

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

N. Y. Partnership Law § 98. Rights, powers and liabilities of a general partner

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate.

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(c) Confess a judgment against the partnership.

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

N. Y. Partnership Law § 108. Assignment of interest

(1) A limited partner's interest is assignable.

* * *

(4) An assignee shall have the right to become a substituted limited partner if all the members, except the assignor, consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. PENSION FUND and VITO J. PITTA and ALBERT A. FORMICOLA, as Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund,

Petitioners,

v.

PARK SOUTH HOTEL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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November 4, 1988

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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22.5, petitioners respectfully submit this Reply Brief to address arguments first raised by the Brief in Opposition of respondent Park South Hotel Corporation ("PSHC" or "Respondent").

1. *The Decision Below is Clearly Erroneous*

In the Petition, we demonstrated that, by concluding that the obligation to contribute continued, the Second Circuit misinterpreted the partnership law consequences of the sale of 100% of the partnership interests to Donald Trump. *See*, the Petition at 13-16. The Court of Appeals failed to consider N.Y.

Partnership L. § 72(4) (McKinney 1988), which bars liability by a successor partnership for the debts of its predecessor, dissolved by a 100% change in membership, if the incoming partners have *not* promised to pay the debts.

Respondent suggests that *Kanarek* v. *Gadflex Associates*, 115 A.D.2d 592, 496 N.Y.S.2d 253 (2d Dept. 1985), *app. denied*, 67 N.Y.2d 602 (1986), supports the Second Circuit's error. However, in *Kanarek*, the limited partnership never dissolved: its sole general partner assigned his interest but continued "to serve and perform the functions of his position". *Kanarek*, *supra*, 115 A.D.2d at 592. Consequently, the issue of a successor partnership's liability for its predecessor's debts never arose.

By contrast, in this case, PSHC and its partners (the "PSHC partnership") dissolved their partnership by withdrawing from any participation in the partnership business. *See*, the Petition at 14. Their successors, Trump and Barbizon Plaza Realty Corporation, refused to assume the obligations of the dissolved partnership, including the obligation to contribute. Accordingly, the PSHC partnership's obligation to contribute ceased, thereby triggering a withdrawal pursuant to 29 U.S.C. § 1383.

2. *Respondent Misapplies the Decision in the Connors Case*

Respondent's reliance on *Connors* v. *B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986), is misguided. Contrary to respondent's assertions, *Connors* offers no escape from withdrawal liability where a sale of partnership interests terminates the original employer's obligation to contribute.

First, as the District Court below pointed out, *Connors* involves a mistaken application of 29 U.S.C. § 1398, the "change in business form" exemption, to sales of partnership interests:

> [PSHC] does not and cannot argue that the transfer of 100% of the partnership interests is covered by

> § 1398(1)(B), which excepts from the definition of a withdrawal "a change to an unincorporated form of business enterprise." The clear implication of this exception is that the exception only applies when a corporation changes to an unincorporated association. Since the partnership was concededly never incorporated in the first place, § 1398(1)(B) does not apply.
>
> Although neither party has cited the case, the Court notes that at least one district court has interpreted § 1398(1)(B) to apply to a factual situation in which one partner in a two-party partnership is replaced with another partner. *See Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986). This case, which apparently interprets "a change *to* an unincorporated association" to include a change *in* an unincorporated association, appears to be at odds with the plain language of the statute.
> (Emphasis in original.)

671 F. Supp. at 1005 n.9 (36a).[1] Therefore, to the extent that PSHC relies on this aspect of *Connors*, respondent invokes a holding which this Court should disapprove.[2]

Second, even if § 1398 were applicable to sales of partnership interests, the exemption is expressly limited to changes in business form which cause "no interruption in employer contributions or obligations to contribute", and therefore, has no application to the instant case. 29 U.S.C. § 1398. The District Court below pointedly noted:

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[1] Numbers in parentheses followed by "a" refer to pages in the Appendix to the Petition.

[2] The district court in *Connors* defined "employer" to include partnerships, regardless of *context*. *See*, *Connors*, *supra*, 646 F. Supp. at 168. In the context of § 1398, such a definition becomes nonsensical: a partnership obviously cannot change its "*corporate* structure" or "*to* an unincorporated form" (emphasis supplied). 29 U.S.C. § 1398.

> In any event, the *Connors* case is clearly distinguishable from the instant action. Section 1398(1)(B) will only apply if the new partnership not only continues contributing to the Fund, but also assumes the old partnership's obligation to contribute. *See* 29 U.S.C. § 1398. In *Connors*, the agreement transferring the partnership interests "clearly transferred . . . all of the benefits and obligations of the predecessor" partnership. *See Connors, supra*, 646 F. Supp. at 169. In the instant case, however, the purchase agreement did not transfer any obligations of Park South Associates I to the partners of Park South Associates II and, indeed, the agreement specifically provided that Trump would not assume any liabilities of the old partners. In view of that circumstance, even assuming *arguendo* that § 1398(1)(B) could apply to a 100% change in a partnership's membership, that section would still be inapplicable.

671 F. Supp. at 1005 n.9 (36a).[3]

Significantly, to determine whether or not the obligation to contribute had ceased, thereby resulting in a withdrawal, the district court in *Connors* examined the agreement which transferred the partnership interests. *See*, *Connors*, *supra*, 646 F. Supp. at 169. Thus, even *Connors* rejects respondent's contention that the terms of such agreements have no relevance to the issue of withdrawal.[4]

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[3] Unlike the instant case, *Connors* involves a transfer of *less than* 100% of the partnership interests in a business. Consequently, unlike the obligation to contribute herein, the obligation to contribute in *Connors* also continued to exist by operation of state law. *See*, N.Y. Partnership L. § 72 (McKinney 1988); *see also*, the Petition at 14-15.

[4] Respondent's argument confuses withdrawal liability with obligations to contribute, thereby repeating an error committed by the Second Circuit. *See*, the Petition at 16-17. As *Connors* notes, these two types of obligations are distinct. *See*, *Connors*, *supra*, 646 F. Supp. at 169. While withdrawal liability is imposed by federal statute (*see*, 29 U.S.C. § 1381), obligations to contribute may

(Footnote continued)

The decision below stands alone in failing to find a withdrawal where the agreement to transfer partnership interests does not provide for the assumption of the original employer's obligation to contribute by the successor. In light of the Second Circuit's clear errors, and the resultant distortion of the statutory scheme devised by Congress, this Court should address the questions presented.

3. *The Decision Below Threatens the Stability of Multiemployer Plans*

Respondent argues, incorrectly, that 29 U.S.C. 1392(c), the so-called "anti-sham provision", adequately protects multiemployer plans from sales of partnership interests in which the original employer's obligation to contribute is not assumed by the successor. Respondent further suggests, again incorrectly, that such transactions are unlikely to occur and do not pose a significant threat to the plans.

PSHC ignores its own conduct. By its own admission, respondent structured the transaction herein as a sale of partnership interests, rather than as a direct sale of assets, in order to avoid adverse *tax* consequences. *See*, 581 F.2d at 581 (16a); 671 F. Supp. at 1002 (29a). Surely, other equally sophisticated parties can be expected to restructure their deals as sales of partnership interests to avoid adverse *withdrawal liability* consequences if the decision below is permitted to stand. In that event, the otherwise legitimate transactions will be shielded from § 1392(c) by the authority of the decision below.

Since such transactions undermine the ability of multiemployer plans to collect withdrawal liability, and threaten their contribution bases, thereby frustrating the intent of Congress, this Court should not permit the decision below to stand.

---

arise from collective bargaining agreements (*see*, 29 U.S.C. § 1392), as in the instant case. Thus, although the parties to a transaction cannot, by agreement, avoid a withdrawal liability, the successor employer may decline to assume its predecessor's *contractual* obligation to contribute. *See*, the Petition at 16-17. Accordingly, Trump's refusal to assume his predecessors' obligations is *not* a mere indemnification clause. *See, id.*

Conclusion

For the foregoing reasons and those set forth in the Petition, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

November 4, 1988,

Respectfully submitted,

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